No. 84244

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IN THE
SUPREME COURT OF MISSOURI

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JOHN WINFIELD,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of St. Louis County, Missouri,
21st Judicial Circuit, Division II
The Honorable Maura B. McShane, Judge

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RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal arises out of the denial of appellant's Rule 29.15 motion to vacate sentence and judgment. The convictions sought to be vacated were for two counts of murder in the first degree, in violation of § 565.020, RSMo 2000, two counts of first

degree assault, in violation of § 565.050, RSMo 2000, and four counts of armed criminal action, in violation of § 571.015, RSMo 2000, for which appellant was sentenced to death for the first degree murders, and life plus ninety years for the remaining convictions. Therefore, the Supreme Court of Missouri has exclusive appellate authority. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, John Winfield, was charged with two counts of murder in the first degree, in violation of § 565.020, RSMo 2000, two counts of first degree assault, in violation of § 565.050, RSMo 2000, and four counts of armed criminal action, in violation of § 571.015, RSMo 2000 (L.F.30-34).[1] The cause was tried in the Circuit Court of St. Louis County before the Honorable Maura B. McShane on July 13, 1998 (Tr.11).

The evidence presented at trial showed the following: In September of 1996, Carmelita Donald, a surviving victim in this case, lived in a second floor apartment at 8100 Page in St. Louis County with her sister, Melody Donald (Tr.58). Shawnee Murphy, one of the murder victims in this case, lived downstairs from Melody and Carmelita along with her three children (Tr.588-589). Arthea Sanders, the other murder victim in this case, also lived downstairs (Tr.588). Carmelita and Melody became friends with Shawnee and Arthea and, after a while, Arthea moved upstairs and began living with Melody and Carmelita (Tr.589,654-655).

Carmelita and appellant met in 1987, when Carmelita was still in high school; she later began dating appellant and then moved in with him (Tr.590,652). They had two

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[1]The following abbreviations will be utilized to reference the record on appeal: Appellant's Brief ("App.Br."); Trial Transcript ("Tr."); Direct Appeal Legal File ("L.F."); Postconviction Relief Hearing ("PCR.Tr."); and Postconviction Relief Legal File ("PCR.L.F.").

children together, 8 year old Mykale Donald, and 6 year old Symone Winfield (Tr.590,650-652). Both Carmelita and Melody used to live with appellant and his family at various different locations (Tr.589-590,652). Carmelita and appellant had a difficult relationship, though, so Carmelita broke it off with appellant and she and Melody moved out of appellant's family's home; in the Spring of 1996, Carmelita and Melody moved in together at the apartment on Page (Tr.590-592,652-654). Appellant lived in a house on Liberty, along with his family, that was about a block from Carmelita and Melody's apartment on Page (Tr.591,653-655). Because of their proximity, Carmelita and appellant shared physical custody of their children (Tr.655).

On September 9, 1996, Carmelita went out for the evening with a man named Tony Reynolds (Tr.656). Appellant did not know about Carmelita's relationship with Tony (Tr.656). Carmelita and Tony decided that they both wanted to tell appellant, at some point, about their involvement (Tr.656-657).

Between 10:00 and 11:00 pm that night, Melody received several calls from appellant inquiring about Carmelita (Tr.592-593). Appellant first called and wanted to know where Carmelita was (Tr.592). Melody told appellant she did not know where her sister was (Tr.592-593). Appellant called again and told Melody to tell Carmelita not to call him (Tr.593). Then, appellant called a third time and instructed Melody to have Carmelita call him as soon as she got home (Tr.593).

Appellant then came over to Carmelita and Melody's apartment (Tr.593-594). Appellant asked where Carmelita was and made a telephone call (Tr.594). Melody repeated

that she did not know where her sister was (Tr.594). Appellant lingered at the apartment for about ten to fifteen minutes, then left, only to return about ten minutes later (Tr.594). When he came back, appellant was following Arthea Sanders, who went into the apartment she shared with Carmelita and Melody (Tr.594-595). Again, appellant asked where Carmelita was (Tr.595). Melody reiterated that she did not know (Tr.595).

Melody learned that Carmelita was out with a man named Tony Reynolds (Tr.595-596). Arthea and Melody decided to lie to appellant and tell him that Carmelita was at Arthea's mother's house (Tr.596). Arthea and Melody believed that this explanation would appease appellant, who was already upset, and cause him to leave (Tr.596).

Melody decided to go downstairs to Shawnee's apartment to telephone Arthea's parents to let them know that they had told appellant that Carmelita was at the Sanders' house (Tr.596). Shawnee was at her apartment with her three sleeping children and a guest, James Johnson (Tr.596-597,685-687). While Melody was downstairs in Shawnee's apartment, she heard a crash upstairs (Tr.597). Melody returned to her apartment to find that appellant had knocked over and broken the entertainment center (Tr.597). Appellant said he needed to talk to Melody and asked how she could do this to him (Tr.598). Melody had no idea what appellant was talking about (Tr.598). Melody returned to Shawnee's apartment and said that appellant was angry because Carmelita was not there and was upstairs turning over furniture (Tr.688-689). Melody and Shawnee went upstairs, then returned downstairs along with appellant (Tr.689-690). Appellant asked Shawnee where Carmelita was; Shawnee said she did not know (Tr.690). Appellant did not believe Shawnee,

and claimed that Shawnee knew where Carmelita was, and promised to "kick [Carmelita's] ass" when she returned home (Tr.690).

Carmelita, meanwhile, returned around midnight, along with Tony Reynolds, to the area of her apartment at Page and Midland; she noticed appellant's white Cadillac automobile (Tr.601,657-658). Tony said he would take Carmelita to his female cousin Jarita's house and have Jarita take her back home "so it won't be no shit started" (Tr.657). Carmelita agreed (Tr.657). Tony's cousin, Jarita, gave Carmelita a ride home (Tr.658,681-684).

Carmelita went into her apartment building and found appellant waiting there for her (Tr.598,658-659). Appellant confronted Carmelita, said he needed to talk to her, and pushed her down the steps and outside to a nearby parking lot (Tr.598-599,659). Appellant said, "I have just one question to ask you, and that's are you fucking with that nigger Tony?" (Tr.659). Carmelita acted like she did not know what appellant was talking about, but appellant persisted (Tr.659-661). Carmelita then asked if appellant was talking about her brother, who was also named Tony, but appellant said, "Nah, you know I ain't talking about him" (Tr.660). Carmelita kept denying that she was involved with Tony Reynolds, but appellant insisted, "Well, she ain't going to lie" (Tr.660-661). Carmelita asked who "she" was, but appellant would not say (Tr.660).

Meanwhile, while appellant and Carmelita were outside talking, Melody and Shawnee were downstairs in Shawnee's apartment; Arthea, though, went outside (Tr.599-600). Melody then heard a sound like air coming out of a tire; Arthea had slashed a

tire on appellant's car (Tr.600,626). Arthea then returned inside (Tr.600,692).

Arthea instructed Melody to call the police and yelled outside to Carmelita to see if she was all right (Tr.600,660). Carmelita assured Arthea that she was fine (Tr.601,660). Carmelita then heard something hit appellant's car (Tr.661). Melody heard a car door slam; she decided not to call police because she believed that the slamming of the car door meant that appellant was leaving (Tr.601). Appellant, however, ran into the apartment building (Tr.661). Carmelita followed (Tr.661).

Melody heard Carmelita tell Arthea that he was coming to get her, to run, and that he had a gun; she then heard Arthea running (Tr.601-602,628). Appellant entered Shawnee's apartment and said something like, "You don't have nothin' to do with this" or "You think that's funny" or "It's all your fault, bitch" and shot Arthea in the head (Tr.603-604,661,62-694). Arthea was unarmed (Tr.603).

Appellant then turned the gun on Carmelita (Tr.661). Carmelita pleaded with him, but appellant said "Fuck you, bitch" and pulled the trigger (Tr.661-662). He shot her numerous times (Tr.604,662-663,694). Both Carmelita and Melody had seen appellant with the gun he used in the past (Tr.622-623,662). The last thing Carmelita remembered was seeing appellant's face and the flash from the gun; the next thing she remembered was waking up in the hospital (Tr.662).

Melody and James ran into the kitchen and tried to escape out the back door of Shawnee's apartment but it was jammed (Tr.604,694-695). Shawnee, meanwhile, tried to get her kids, but appellant shot her, too (Tr.604-605,616). Shawnee had pleaded with him,

saying, “my babies” and “No, Johnny, no,” but appellant said, “Shut the fuck up, bitch” and shot her (Tr.604,616,695). Appellant turned towards Melody; and she dropped to the floor (Tr.605,648). Appellant then turned to James, pointed the gun at him, and said, “You next” (Tr.695). James grabbed the gun and the two men struggled (Tr.605,695-696). While James wrestled with appellant over the gun, James heard the gun click (Tr.648,696). Appellant hit James with the gun (Tr.696). James was able to break free and run (Tr.696-698). Melody was also able to escape and she ran to a neighbor’s house and called police (Tr.605-606).

Officer Thomas Crowley, with the Vinita Park Police Department, was dispatched to the scene at 8100 Page (Tr.718). Officer Crowley entered the residence and found Carmelita (Tr.720). He asked her who shot her, but she did not respond (Tr.720). He found two small children on a bed in Shawnee’s living room (Tr.721). He also found Arthea and Shawnee (Tr.721). Arthea had a facial wound and was not breathing, nor did she have a pulse (Tr.721). Shawnee had a chest wound; like Arthea, she had no vital signs, pulse, or respiration (Tr.721). Officer Crowley spoke with Melody, who named appellant as the gunman (Tr.722). Officer Crowley determined that appellant lived at 7517 Liberty, a block from the crime scene, and asked University City Police to be on the lookout for appellant (Tr.723-724).

Officer Thomas Carney, with the University City Police Department, was assigned to arrest appellant (Tr.764-765). On September 10th, Officer Carney went to appellant’s home at 7517 Liberty to take him into custody (Tr.765-766). Officer Carney arrested

appellant and booked him at the police station (Tr.766-767). While booking appellant, Officer Carney advised appellant of his rights and appellant said he understood those rights (Tr.767). Officer Carney then asked appellant what he did with the gun (Tr.768). Appellant said he threw it into a creek (Tr.768). Appellant said that the creek was off of Vernon near Pennsylvania where a bridge was being built (Tr.768). Appellant did not ask Officer Carney about the condition of the victims (Tr.770).

After appellant had been arrested, Lieutenant Michael Webb, with the Vinita Park Police Department, responded to appellant's home at 7517 Liberty to conduct a search for the weapon (Tr.772-775). Appellant's 1992 Cadillac automobile was in the driveway; the right front tire was flat (Tr.782-783). Appellant's mother consented to a search of the home and directed officers to appellant's basement bedroom (Tr.775,779). There, Lieutenant Webb found Winchester .380 caliber ammunition in a gym bag (Tr.780). Later, Lieutenant Webb was informed that appellant had admitted that he threw the gun in a creek (Tr.780). Lieutenant Webb arranged to have that area searched, but no gun was ever found in the location that appellant had specified (Tr.781).

John Kaltenbronn, a firearms examiner with the St. Louis County Police Department Laboratory, analyzed the ballistics evidence in this case (Tr.821-824). He received six spent shell casings recovered from the scene and five projectiles — four from the scene and one which was recovered during the autopsy of Shawnee Murphy (Tr.742-762,819-821,823-825). Kaltenbronn found that the projectiles were all .380/9mm caliber and they had 6 lands and grooves with a left hand twist (Tr.825).

Kaltenbronn concluded that all five projectiles were definitely fired from the same firearm and indicated that they were most likely fired from a Davis. 380 (Tr.825-29). Kaltenbronn explained that a Davis .380 automatic had a magazine that would hold five bullets; the gun would hold six bullets if one were to chamber a round and top off the magazine (Tr.827-828). Kaltenbronn also explained that a Davis .380 automatic would require six trigger pulls to fire the gun six times (Tr.829).

Dr. Eric Sherburn, a neurosurgeon, treated Carmelita Donald (Tr.791-793). She suffered multiple gunshot wounds (Tr.793). When she arrived at the emergency room, she was comatose (Tr.793). Her most serious injury was a gunshot wound to the head, with the entry wound being in the right temporal region, and the exit wound being on the opposite side of her head (Tr.793). She also suffered gunshot wounds underneath her chin, to her shoulder and to her hand (Tr.663,794).

Carmelita needed to have emergency brain surgery because of a bruise behind her left eye (Tr.795-796). She also had to have a surgical tracheostomy because her chin was so severely damaged that there was some concern as to whether she could breathe properly through her throat (Tr.796). Carmelita had to also undergo surgery to repair the damage to her jaw (Tr.797). She has a bullet that remains in her spine (Tr.799).

As a result of the gunshot wound to her head, Carmelita was blinded (Tr.663,794). Her right eye was completely destroyed by the gunshot wound and had to be removed; the bullet severed the nerve that would have permitted her to have vision out of her left eye (Tr.663,794,797). Carmelita will never regain her sight, in either eye (Tr.797). At the time

of trial, Carmelita was not working and was living with her children by appellant and her mother (Tr.650-652). In August, 1998, Carmelita was scheduled to attend a school so that she could learn how to live independently as a blind person (Tr.651).

Dr. Mary Case, the chief medical examiner for St. Louis County, performed autopsies on both Arthea Sanders and Shawnee Murphy (Tr.801,805). Arthea was 20 years old (Tr.805-806). She suffered a gunshot wound to the face that entered just below the right eye (Tr.806). Because of the large amount of soot around the wound, Dr. Case was able to determine that the shot was fired from close range (Tr.807). This shot injured Arthea's cerebellum which, in turn, caused her to stop breathing and led to her death (Tr.808-809,819).

Shawnee Murphy was 23 years old (Tr.810). She suffered a gunshot wound to the chest, near her clavicle (Tr.812). The bullet passed through her pericardial sac, aorta, and pulmonary artery (Tr.812-813). This caused bleeding which compressed her heart and prevented it from beating; this is known as "tamponade" (Tr.813). She died from the gunshot wound to the chest and the resulting loss of blood and tamponade (Tr.814-815,819).

Appellant testified in his own defense (Tr.843). Appellant said that Shawnee had told him that Carmelita was out with Tony Reynolds and that the tire on his car was cut (Tr.871-872,894). Appellant claimed that he "just snapped" and then "all hell broke loose" (Tr.895). Appellant claimed, "I didn't plan on hurting nobody" (Tr.895). He said he did not remember the shootings (Tr.896). He admitted that he lied to the police about his

involvement, telling them at first that another man with a gun had entered the apartment building (Tr.902,941,943-944,947).

Following the guilt phase evidence, instructions, and arguments of counsel, appellant's jury found him guilty as charged (L.F.232-239). The state then adduced evidence in the penalty phase (Tr.1033). The state first presented a certified copy of appellant's prior conviction for receiving stolen property (Tr.1033). The state also adduced testimony from Carmelita Donald that appellant had been violent towards her in the past, hitting her and giving her a black eye in 1992, and putting a gun to her head in 1993 until she submitted to his sexual demands (Tr.1033-1036). The state also called Arthea's mother, Melody Sanders, and Shawnee's mother, Gerry Murphy, as part of the penalty phase evidence (Tr.1040,1044). Appellant then presented evidence in mitigation of punishment by calling his father, step-mother, his brother, and a family friend from church (Tr.1055-1082).

At the close of the penalty phase evidence, instructions, and arguments of counsel, the jury recommended that appellant be sentenced to death for the murders of Arthea Sanders and Shawnee Murphy (L.F.240-241). The jury found, as a basis for consideration of capital punishment, that the murder of Arthea Sanders was committed while the defendant was engaged in the commission of another unlawful homicide of Shawnee Murphy, and that the murder of Shawnee Murphy was committed while the defendant was engaged in the commission of another unlawful homicide of Arthea Sanders (L.F.240-241). On September 18, 1998, the court sentenced appellant, in accordance with the jury's

verdicts, to two death sentences for the murders of Arthea Sanders and Shawnee Murphy, a life sentence for assault in the first degree as to Carmelita Donald, fifteen years for assault in the first degree as to James Johnson, and four sentences of 75 years for each of four counts of armed criminal action (SentTr.5).

Appellant's convictions and sentences were upheld by this Court on direct appeal. *State v. Winfield*, 5 S.W.3d 505 (Mo. banc 1999). On March 6, 2000, appellant filed a *pro se* motion for postconviction relief (PCR L.F.7), and an amended motion was filed on June 2, 2000 (PCR L.F.29). An evidentiary hearing was held in the Circuit Court for the city of St. Louis on May 4, 2001 (PCR HearingTr.5). The motion court issued its findings of fact and conclusions of law denying appellant's claims on December 17, 2001 (PCR L.F.269). This appeal follows.

ARGUMENT

I.

The motion court was not clearly erroneous in denying, after an evidentiary hearing, appellant's Rule 29.15 motion alleging that trial counsel prevented him from testifying during the penalty phase of appellant's trial because trial counsel did not act unreasonably nor was appellant prejudiced in that trial counsel testified that he advised appellant to not testify during the penalty phase based upon appellant's unhelpful testimony during guilt phase and appellant did not want to testify during the penalty phase.

In his first point on appeal, the appellant contends that he received ineffective assistance of trial counsel based on his allegation that "trial counsel did not let him testify during penalty phase" (App.Br.39). Appellant's claim is based on appellant's deposition admitted at the evidentiary hearing and testimony from guilt-phase trial counsel, Brad Kessler, that appellant did indeed want to testify during penalty phase. In essence, appellant's claim asks this Court to perform *de novo* review on the motion court's findings of credibility. This Court, however, does not perform *de novo* review. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991).

A. Facts

On May 4, 2001, an evidentiary hearing was held on appellant's Rule 29.15 motion. At this hearing, appellant's trial attorneys, Brad Kessler, who was assisted by Linda Bates, and Scott Rosenblum, testified (PCR.Tr. 27,87,191). Testimony was adduced that Mr.

Kessler had responsibility for the guilt phase of appellant's trial, while Mr. Rosenblum was to prepare for the penalty phase (PCR.Tr. 103-104,201). Kessler alleged in his testimony at the evidentiary hearing that appellant had informed him before trial that appellant wanted to testify during the penalty phase (PCR.Tr.116). Kessler also testified that he told Rosenblum that appellant wanted to testify during the penalty phase, but Rosenblum "waved" him off and did not let appellant testify (PCR.Tr.116-17).

Rosenblum testified that he spent "a lot of time talking with [appellant] about whether or not he was going to testify," and that it was appellant was the one who ultimately made the decision to not testify during penalty phase (PCR.Tr.207). Rosenblum also testified that he was aware that the decision of whether appellant would testify rested with the appellant (PCR.Tr.294), but that he believed appellant testifying during the penalty phase would be "devastating" (PCR.Tr. 208). Rosenblum also testified that appellant never indicated to Rosenblum that he did want to testify (PCR.Tr.209). Rosenblum stated that after calling the last penalty phase witness, he walked over to counsel table, placed his hand on appellant and informed both appellant and Kessler that he would be resting (PCR.Tr.231). No one informed Rosenblum at that point that appellant desired to testify (PCR.Tr.231).

In denying appellant's claim, the motion court found that:

> In Paragraph 8(D), [appellant] alleges that he wanted to testify during the penalty phase of the trial. There are multiple reasons why this claim would not succeed. [Appellant] was advised of his right to testify and chose

to exercise it in the guilt phase. Tr. at 834-9. Ironically, [appellant's] seventh claim is that trial counsel ineffective for allowing [appellant] to testify during the guilt phase because [appellant's] "testimony was unnecessary and dangerous." Amended PCR Motion at 74. [Appellant] concedes that "The result of [appellant's] testimony was disastrous." Id. at 81.

Second, [appellant] decided that he did not want to testify. Mr. Rosenblum and [appellant] had discussed [appellant's] right to testify in the penalty phase. Id. at 211. [Appellant] never told Mr. Rosenblum that he wanted to testify even though they discussed him testifying in the penalty phase. PCR Hearing at 209,211. The Court found the testimony of Mr. Rosenblum to be credible based upon the demeanor of Mr. Rosenblum while testifying and based upon the testimony taken as a whole. Mr. Kessler and Ms. Bates attempted to contradict Mr. Rosenblum's recollection of [appellant]'s desire to testify. Mr. Kessler and Ms. Bates testified as to how Ms. Bates, during the course of trial in the penalty phase, made actual contact with Mr. Kessler and told Mr. Kessler that [appellant] wanted to testify. PCR Hearing at 115. Mr. Kessler claims that he started to "lean over" while sitting in a chair and told Mr. Rosenblum that [appellant] wanted to testify but Mr. Rosenblum gave Mr. Kessler the "wave off". The "wave off" was described by Mr. Kessler as a "speak of the hand," dismissive gesture, used to ignore somebody and which is part of law firm culture where he worked. Id.

at 116,117. Mr. Kessler then states that "I wasn't all the way up. I kind of sat back down." Id. at 199. He then looked at Ms. Bates who was shaking her head. Id. Mr. Kessler did not attempt to re-open the case because it was not his "stage of the trial, arrogance, whatever it is." Id. at 121-23. Mr. Kessler never informed the Court about [appellant] wanting to testify during the proceedings. Id. at 185. Nor did Mr. Kessler inform the Court when he was in chambers with the judge without Mr. Rosenblum after the last witness was called during the penalty phase but before closing arguments. Id. at 187. Nor did Mr. Kessler see [appellant] attempt to tell the judge that he wanted to testify. Id. at 189.

Ms. Bates' testified that [appellant] informed her that he wanted to testify during the penalty phase of the trial. Id. at 71. It was only after Mr. Rosenblum rested that Ms. Bates leaned over to Mr. Kessler and told him that [appellant] wanted to testify. Id. at 45,71. [Appellant] did not inform Ms. Bates at that instant that he wanted to testify but had done so earlier. Id. at 72. Ms. Bates claims that Mr. Kessler then either got up or reached for Mr. Rosenblum. Id. at 47. Mr. Rosenblum then either shooed him off or was unresponsive, according to Ms. Bates. Id. at 48. At that point the instruction conference commenced. Id. at 49. Ms. Bates never attempted to inform the Court of [appellant]'s desire to testify in the penalty phase. Id. at 75-79.

[Appellant] claims that he and Mr. Kessler told Mr. Rosenblum that

[appellant] wanted to testify during the penalty phase. Depo of Winfield at 16. [Appellant] claims that Mr. Rosenblum waived his hand, rested, and the instructions were immediately read. Id. at 17,19,144. [Appellant] said he was unable to stop the proceedings. Id. at 19. If he could have testified he would have asked the jury to spare his life and that he loved his children and he would have testified about his background. Id. at 19,20. He also would have testified that he did not commit the murders. Id. at 136. The record contradicts [appellant]'s version of events in that there was between an hour and an hour and a half break between the time the last witness was called and when the instructions were read. Id. at 235-6. Likewise, [appellant] never mentioned at sentencing during the Rule 29.15 questioning that he wanted to testify during the penalty phase of the trial. Sentencing Proceedings at 6-13.

Ms. Niehoff, who was present in the courtroom during the penalty phase, testified that she was watching Mr. Rosenblum and Mr. Kessler and never saw Mr. Kessler get up to try to contact Mr. Rosenblum and never saw Mr. Rosenblum waive Mr. Kessler off. Id. at 366-368,370.

Mr. Rosenblum testified that he spent a lot of time talking to [appellant] about his right to testify in the penalty phase of trial. Id. at 207. Mr. Rosenblum thought it would be devastating for [appellant] to testify in the penalty phase of trial because [appellant] was "devoid of any emotion" and "came off as extremely cold and indifferent." Id. at 208. Although Mr.

Rosenblum advised [appellant] that he did not think [appellant] should testify, Mr. Rosenblum told [appellant] to think about it. Id. at 209-11. As they discussed the witnesses to be called during the penalty phase, [appellant] never indicated that he wanted to testify. Id. 209-11,341-44. Nor did Mr. Kessler ever inform Mr. Rosenblum that [appellant] wanted to testify. Id. at 233. Mr. Rosenblum also denied making any hand gestures to Mr. Kessler. Id. Mr. Rosenblum testified that after he put on the last witness there was an instruction conference. Id. at 234. No one came to him during that time period and indicated to him that [appellant] wanted to testify. Id. at 234-4. After the instruction conference, court resumed and Rosenblum moved to enter an exhibit into evidence. Id. at 235.

The trial transcript verifies Mr. Rosenblum's account of the incident. The record shows that after the last witness was called during the penalty phase the Court took a break to conduct the instruction conference. Tr. at 1081-82. The attorneys were present for the instruction conference. Id. at 1082. Mr. Rosenblum indicated during the instruction conference that the defense had not yet rested. Id. at 1087. After the proceedings resumed, Mr. Rosenblum moved to enter an exhibit into evidence. Id. at 1089. The Court was able to observe Mr. Kessler's, Ms. Bates' and Mr. Rosenblum's demeanor while testifying, the Court was able to evaluate the reasonableness of their testimony considered in the light of all the evidence of the case, and

> the Court was able to evaluate the inconsistencies in their testimonies concerning the same event. Is inconceivable that an experienced trial lawyer, PCR Hearing at 87-92, or even a new member of the bar would sit by and out of "arrogance" not inform this Court of [appellant]'s desire to testify. The Court concludes that the only reason it was not informed of [appellant]'s desire to testify is because [appellant] did not want to testify during the penalty phase of the trial. This is buttressed by the Rule 29.15 examination conducted of the [appellant] where he never mentioned that he wished to testify during the penalty phase of the trial.

(PCR.L.F.279-83) (footnote omitted).

B. Standard of Review

On appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." *Supreme Court Rule* 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the appellate court is left with "a definite and firm impression that a mistake has been made." *Wilson v. State*, 813 S.W.2d at 835.

C. Trial counsel did not act unreasonably

As the motion court properly found, appellant did not receive ineffective assistance of counsel. In order to show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," and that he was prejudiced by his

counsel's failure to competently perform. *Wilson v. State*, 813 S.W.2d at 835.

As can be seen from the above evidence, the motion court properly found that penalty phase counsel Scott Rosenblum's testimony was credible. Credibility of witnesses is for the motion court to determine. *State v. Crawford*, 68 S.W.3d 406,408 (Mo.banc 2002); *Rousan v. State*, 48 S.W.3d 576,585 (Mo.banc 2001). The motion court may believe all, some or none of the testimony provided by witnesses when considered in light of the facts, circumstances and other testimony in the case. *State v. Crawford*, 69 S.W.3d at 408.

Rosenblum testified that it was appellant was the one who ultimately made the decision to not testify during penalty phase (PCR.Tr.207). Rosenblum also testified that appellant never indicated to Rosenblum that he did want to testify and that no one informed him that appellant wished to testify when Rosenblum rested (PCR.Tr.209,231).

The motion court's findings that Kessler and appellant's testimony were not credible can be supported by Kessler's admission that he did not bring to the trial court's attention that appellant desired to testify (PCR.Tr.185), even though there was over an hour break between the time Rosenblum informed Kessler and appellant that he would be resting and the completion of the jury instructions for the second phase (PCR.Tr.236). Also corroborating Rosenblum's testimony was testimony provided by an assistant prosecutor, Melissa Niehoff, who stated that there did not appear to be any conflict between the two attorneys during appellant's trial (PCR.Tr.366,367). She also testified that she watched

Rosenblum almost the entire time he was examining witnesses during the penalty phase and she did not see Rosenblum attempt to "wave off" appellant or Kessler (PCR.Tr.364,366,368-70).

Appellant asks this Court to discount the findings of the motion court and to believe the testimony of the him and Kessler (App.Br.39). This Court, however, does not perform *de novo* review. *Wilson v. State*, 813 S.W.2d at 835.

Penalty phase counsel Rosenblum did not act unreasonably in not calling appellant to testify as appellant did not want to testify during the penalty phase (PCR.Tr.209). Based upon appellant's testimony during the guilt phase, which resulted in appellant "coming off" as "devoid of any emotion," "extremely cold," and "indifferent" (PCR.Tr. 208), it was quite reasonable to not call appellant to testify.[2]

D. Appellant was not prejudiced

Likewise, appellant was not prejudiced by not testifying at the penalty phase of his trial. To be prejudiced, there must be a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. *State v. Shurn*, 866 S.W.2d 447, 455 (Mo banc 1993), *cert. denied* 513 U.S. 837 (1994) (quoting *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992), *cert. denied* 507 U.S. 954 (1993)). Under

[2]Appellant, in an attempt to buttress his argument that Rosenblum acted unreasonably, excerpts statements that were ordered by the motion court to be stricken from the record (App.Br.44; PCR.Tr.120).

Strickland, a reasonable probability is that sufficient to undermine the confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668,694,104 S.Ct. 2052,80 L.Ed.2d 674 (1984).

The motion court made the following findings regarding prejudice:

> Finally, [appellant] "has not proved he was prejudiced by his failure to testify. There is no reasonable probability that if he would have testified the result of the proceeding would have been different." Rousan v. State, 48 S.W.3d 576, 586 (Mo.banc 2001). If [appellant] testified during the penalty phase he could have been impeached by his prior inconsistent statements as well as that testimony given during the guilt phase of the trial. See id. at 586-7. Likewise his attorneys would have been limited to asking him his name and then turning him over to cross-examination, PCR Hearing at 175-6, because [appellant] would be lying about the commission of the murders. Id. at 175-6, 337. Finally, there can be no prejudice from [appellant] failing to convey to the jury that he wished to have his life spared because that wish would be obvious to the jury whether it was spoken or not. The Court finds this claim is without merit and is denied.

(PCR L.F.283).

Even though appellant had an absolute right to testify during his trial, *Rousan v. State*, 48 S.W.3d at 585, in a claim of ineffective assistance of counsel, appellant still must establish *Strickland* prejudice. *State v. Starks*, 856 S.W.2d 334, 336 (Mo. banc 1993);

Rousan v. State, 48 S.W.3d at 585. Here, the appellant has not shown that he was so prejudiced, *i.e.*, that there is a reasonable probability that the result of his penalty phase would have been different. Indeed, there is no reasonable probability that the jurors would have given a life sentence rather than impose death. At trial, appellant admitted that he was the shooter (Tr.894-95). In his deposition taken for the evidentiary hearing, however, appellant claimed that he did not commit the crimes and that he did not shoot any of the three victims and that he would have testified in his penalty phase testimony that he did not commit the offenses charged (Winfield Depo.94,103,136). Had appellant testified during the penalty phase in such a contradictory manner, his testimony would have been subject to impeachment by the State based upon his prior testimony and prior inconsistent statements provided to the police at the time of his arrest (Tr.942-949). Appellant cannot show that he was prejudiced by not testifying during the penalty phase of his trial.

In light of the foregoing, appellant's first point on appeal must fail.

II.

Appellant's claim that the motion court "plainly erred" in not finding that appellant received ineffective assistance of counsel based on trial counsel's actions in not requesting that the jury be instructed that they could not draw an adverse inference from appellant's decision to not testify during penalty phase is unreviewable in that it was not pled in appellant's Rule 29.15 motion for postconviction relief. In any event, appellant has not shown that this was not trial strategy on the part of trial counsel.

In his second point on appeal, the appellant claims that the motion court "plainly erred" when it failed to find that appellant received ineffective assistance of counsel because trial counsel did not request that the jury be instructed that they could not draw and adverse inference from appellant not testifying during penalty phase (App.Br.50).

Appellant, however, failed to raised this claim in his motion for postconviction relief. This Court had repeatedly held that claim which would properly have been raised in a postconviction motion, but were not included in such a motion, are waived and cannot be reviewed on appeal. *State v. Johnson*, 968 S.W.2d 686,695 (Mo.banc 1998) (stating that "[t]he effect of Rule 29.15(d) is to bar all claims not raised in a timely filed pleading); *State v. Tokar*, 918 S.W.2d 753,769 (Mo.banc 1996), *cert. denied* 519 U.S. 933 (finding that "[a]ppellant waived the ineffective assistance claim when not raised in his pro se 29.15 motion or post-conviction counsel's amended 29.15 motion.); *Coates v. State*, 939 S.W.2d 912,915 (Mo.banc 1997). By failing to raise this claim in his postconviction motion, this

claim not reviewable by this Court. *Id*. [3]

In light of the foregoing, appellant's second point on appeal must fail.

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[3]Respondent gratuitously notes, however, that even had this claim been raised in appellant's postconviction motion, this claim would have failed. Appellant did not questions his trial counsel at the evidentiary hearing about this issue, nor has appellant proven that trial counsel acted unreasonably in not requesting that the jury be provided with the "no adverse inference" instruction. This Court has held that it is not ineffective assistance of counsel to not request that an available instruction be submitted to the jury. *Love v. State*, 670 S.W.2d 499,502 (Mo.banc 1984). It was reasonable trial strategy to not request this instruction as this instruction would only served to highlight appellant's decision to not testify. *See Ellis v. State*, 773 S.W.2d 194,199 (Mo.App., S.D. 1989). This Court, through its approved jury instructions, has recognized this proposition by making the "no adverse inference" instruction optional. *State v. Storey*, 986 S.W.2d 462,463-64 (Mo.banc 1999).

III.

The motion court was not clearly erroneous in denying, after an evidentiary hearing, appellant's Rule 29.15 motion alleging ineffective assistance of counsel based upon appellant's assertion that his trial counsel "constructively abandoned" him by aggressively examining him during appellant's direct examination because trial counsel was not ineffective in that this approach to direct examination was a matter of trial strategy in an to attempt to show the jurors that appellant had "snapped" in the minutes preceding the murders and the examination was performed in this manner in order to deflate the impact of any negative information being elicited by the State during cross-examination.

In his third point on appeal, the appellant contends that he received ineffective assistance of counsel based upon his trial counsel's manner of questioning him during appellant's direct examination in a way that elicited negative information about appellant's crime (App.Br.57). Appellant argues that defense counsel's should not have attempted to address the weaknesses in appellant's case in a head-on manner (App.Br.63).

A. Facts

In his brief on appeal, appellant gives these examples of trial counsel's direct examination of appellant that resulted in trial counsel "constructively absenting" himself:

> A. …I was in the upstairs apartment and just trying to figure out what – you know, what the hell is – what the hell is going on and, you know, I believe I knocked [the entertainment center] over.

Q All right. Well, did you knock it over out of anger or out of – How did it just get knocked over? Things don't just fall.

A. No, it was –You know, I was upset. I was upset.

(Tr.882).

A. I was just basically trying to figure out what was – you know, why was everybody lying, you know, that's all.

Q. All right. Well, you had some idea of the reason they were lying is because she had been out with Anthony Reynolds, correct?

A. Correct.

(Tr.884-885).

A. …I went to my car to see, you know, what was what and I just learned to see that my tire was cut on my car.

Q. All right. And what did you do?

A. Got my gun

Q. All right. Why did you get the gun?

A. I don't know.

Q. Well, we don't know. Why did you get it?

A. At that point, I had just snapped. I don't really know what I was actually thinking.

Q. What were you going to do with the gun?

A. I didn't have any intention of doing anything.

Q. Well, you did something with it. What were you thinking about when you got the gun?

A. (Pause). I just – I went into the apartment building and I just asked – I just asked Arthea what the hell was going on, that's all. And from that point all hell broke loose.

Q. John, you shot her in the face, okay. That's what happened. Why did you shoot her in the face?

A. I don't know. I don't know. I didn't intend – I didn't plan on hurting nobody.

Q. But you shot her. You shot her point-blank range in the face.

A. I just – I said I didn't plan on – I didn't intend on hurting nobody and nothing was planned. And I know that's no justification for anything.

Q. Well, John, these people [the jurors] are entitled to know what you were thinking when you shot her in the face.

A. I don't know what I was thinking about.

(Tr.894-895).

A. …A lot of those things are still cloudy. I'm not saying – I'm not saying that I didn't do it. I'm not saying that.

Q. Well, you're the only person who did it. You're the only person that had a gun. Do you remember doing it?

A. Some of it. Some of it I do.

(Tr.896).

A. …I never had any intention to shoot anybody.

Q. But you shot them. You didn't accidentally shoot them. Your finger moved, it pulled the trigger six times. (Pause).

(Tr.898).

(App.Br.57-59) (emphasis omitted).

During appellant's guilt phase closing argument, trial counsel Kessler took full advantage of the responses that he received from appellant and argued to the jurors that:

... you do have the right to hear everything, good, bad, ugly, horrible. And that's what we did, we gave you everything. We didn't hide anything from you, we didn't conceal anything from you, he didn't get up here and deny that he shot anybody.

(Tr. 1000).

... The evidence in this case is he was mad, he was hot, he was jealous, he was irrational, according to Carmel he was upset.

(Tr. 1002-103). Trial counsel argued throughout his closing that appellant's actions did not indicate cool reflection, and thus, while appellant's actions may have constituted murder in the second degree, he was not guilty of first degree murder (Tr.1000-18).

In its findings of fact and conclusions of law, the motion court, in denying appellant's claim, found that:

[Appellant] claims that trial counsel's direct examination of [appellant] elicited damaging evidence. [Appellant] was fully advised of his

right to testify or not to testify and the advantages and disadvantages of both. Tr. at 843-9. [Appellant] told the Court, "I basically decided to testify and tell my version of the story." Id. at 839. [Appellant's] counsel cannot be found to be ineffective because [appellant] did not have a compelling story to tell. ... This claim is denied as being meritless.

(PCR.L.F. 285).

During the evidentiary hearing, both Rosenblum and Kessler testified that they had purposefully attempted to elicit emotion from appellant during his direct examination in order to support a verdict of second degree murder. The following testimony was elicited from trial counsel Kessler during the hearing:

Q. [By appellant's PCR counsel]: And in turn, did you go over with [appellant] the points that you expected would be raised by the State on cross-examination?

A. [by Kessler]: Yes. And not only did I go over those, I told him that there were things I would go over first so that the jury didn't hear it for the first time through the State.

Q. As a result of your meetings with [appellant], your discussion with him, when you called him to testify in the guilt phase what did you expect [appellant] to say on direct examination.

A. I expected him to say exactly what he said. I wished he had said it in a much different way. And towards that end, I attempted to insert an

emotional prompt with him throughout the course of the direct examination.

Q. And in calling him to testify, ... what did you hope to accomplish with [appellant's] testimony in the guilt phase?

Q. You know, essentially, this was something that was out of the normal for the [appellant] that everybody else knew; that he was not this guy who just all of a sudden decided to do what he had done. You know, he was somebody who had a - - who had emotion. He was reacting under extreme stress.

The circumstances surrounding the shooting led me to believe that he could tell the jury that, look, it is not why he went there, but things just spiraled out of control based on his feelings about Carmelita.

And he had been lied to and his tire was slashed, and then all of a sudden he just lost it. That was the feeling intent and that was the defense, and those were the facts. We just were not able to get that across in an emotional way.

(PCR.Tr.161-62).

Q. [by the State]: ... I'm going to go back when you were examining [appellant]. The reason that you examined him that way was trial strategy; is that correct?

A. I mean, that's how I would have examined him whether it was a trial or not. I mean, yes, that's- - I guess you are calling it trial strategy, it is

trial strategy to ask him questions about what happened.

Q. Ask him questions and see whether or not he will show some emotion and be human to the jury?

A. Right.

Q. He definitely wasn't showing any emotion to the jury?

A. Correct.

(PCR.Tr. 179).

B. Standard of review

On appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." *Supreme Court Rule* 29.15(k).

C. Trial counsel did not act unreasonably

As the motion court properly found, appellant did not receive ineffective assistance counsel. In order to show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," and that he was prejudiced by his counsel's failure to competently perform. *Wilson v. State*, 813 S.W.2d at 835. Moreover, as the United State Supreme Court found in *Strickland v. Washington*, 466 U.S. 668 (1984), strategic choices made after thorough investigation are virtually unchallengeable. *Id*. at 690-91.

Here, trial counsel, as a matter of trial strategy, chose to examine appellant during direct examination in such a way that would minimize the effect of the State's cross-

examination. Trial counsel testified that he was wanting to show that appellant did not cooly reflect when he committed the murders. The purpose of trial counsel's questioning was to show the jurors the emotions that defense counsel argued appellant was feeling when he committed his murders.

Appellant cites *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991), in order to buttress his argument that counsel's trial tactics in questioning appellant and in closing argument "result[ed] in the constructive absence of counsel altogether" (App.Br.63). Appellant's reliance, upon *Swanson*, however is misplaced. In *Swanson*, counsel did not present *any* evidence on the defendant's behalf. *Id*. at 1071. Then, in closing, counsel stated that "the evidence against Swanson was overwhelming and that he was not going to insult the juror's intelligence" and that "this case, I don't think it really overall comes to the level of raising reasonable doubt." *Id*. Counsel concluded his argument by informing the jury that "if they found Swanson guilty, they should not 'ever look back' and agonize regarding whether they had done the right thing." *Id*.

These are not the facts that this Court is presented with in the present case. Nowhere does trial counsel argue that appellant was guilty of the crimes he was charged with—nowhere does the record reflect that trial counsel argued, or forced appellant to admit, that he was indeed guilty of murder in the first degree. In fact, the opposite is true: realizing that there was no merit to an argument that appellant was not the shooter, trial counsel attempted to reduce the offense to murder in the second degree.

The courts of this State have repeatedly explained that there are times when

conceding a defendant's guilt on some issues is reasonable trial strategy. *See* State v. Buchanan, 824 S.W.2d 476,479 (Mo.App., E.D. 1992); State v. Alexander, 782 S.W.2d 472 (Mo.App., W.D. 1990). Thus, in the present case, trial counsel used reasonable trial strategy in conceding appellant's guilt to murder in the second degree and questioning him in such a manner that would deflate the State's cross-examination, in an effort to secure a favorable verdict from the jury, particularly in light of the evidence against the appellant.

D. Appellant was not prejudiced

Likewise, appellant was not prejudiced by not testifying at the penalty phase of his trial. Appellant argues that prejudice should be presumed based upon an "[a]ctual or constructive denial of the assistance of counsel" (App.Br.63) (emphasis omitted). As support for his assertion, appellant cites to the recent Supreme Court opinion in Bell v. Cone, — U.S. —, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (App.Br.64). Respondent agrees with appellant that Bell assists in understanding the proper standard, but disagrees that Bell supports the appellant's argument. There the defendant was charged with, and convicted of first degree murder. Id. at 1848. At the sentencing hearing, the junior prosecutor gave a "low-key" closing. Id. In order to keep the lead prosecutor, who was described as an "effective advocate" from arguing in rebuttal, defense counsel waived final argument. Id. The defendant appealed, arguing that his trial counsel rendered ineffective assistance during penalty phase by failing to present mitigating evidence and by waiving final argument. In rejecting this claim , the United State Supreme Court in Bell, found that,

under the principles established in *Strickland*, trial counsel was not ineffective for failing to adduce mitigating evidence in the penalty phase or by waiving final argument. *Id*. at 1847,1851-52. The Court clarified that when they "spoke in [*United States v. Cronic*, 466 U.S.648,104 S.Ct. 2039,80 L.Ed.2d 657 (1984)] of the possibilities of presuming prejudice based on an attorney's failure to test the prosecutor's cases, we indicated that the attorney's failure must be complete. We said that if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 122 S.Ct. at 1851 (emphasis added).

Thus, contrary to appellant's argument that *Bell* established that prejudice is presumed, the proper standard of showing prejudice is to establish that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. *State v. Shurn*, 866 S.W.2d 447,455 (Mo.banc 1993), *cert. denied* 513 U.S. 837 (1994). Under *Strickland*, a reasonable probability is that sufficient to undermine the confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694.

As there was overwhelming evidence of appellant's guilt, there is no reasonable probability that the result of the appellant's case would have differed had trial counsel gently questioned appellant about his role in the shootings. The evidence adduced at trial that appellant killed two women, attempted to kill another woman by shooting her in the head, but ended up severely injuring her instead. Appellant also tried to shoot two bystanders, however, he ran out of bullets before he could complete his mission. Three of appellant's victim's testified against him at trial, all providing a consistent and concise accounting of the events in question. Police officers also testified as to the differing

stories that appellant had provided them with after his arrest (Tr.942-49). In light of this overwhelming evidence, appellant was not prejudiced by his counsel's questioning of him in an attempt to minimize the impact of the State's evidence.

The Ninth Circuit in *Swanson*, which was cited by appellant in support of his argument, realized that situations such as appellant's would arise and found that "[w]hen a defense attorney concedes that there is no reasonable doubt concerning the only factual issues in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty." *United States v. Swanson*, 943 F.2d at 1073 (emphasis added). In the present case, trial counsel did not, by any stretch of the imagination, concede "the only factual issue in dispute"—which was that of the appellant's mental state at the time of the murders. Trial counsel only conceded an aspect of the case that was not in issue—that appellant was the shooter. In fact, had trial counsel not done so, this would have provided the State with ample ammunition in cross-examination. *See United States v. Cronic*, 466 U.S. at 658 (recognizing that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."). Appellant was not prejudiced by his trial counsel's actions.

In light of the foregoing, appellant's third point on appeal must be denied.

IV.

Appellant's claim, raised for the first time on appeal, that he was denied effective assistance of Rule 29.15 counsel based on counsel's failure to plead three issues in his motion for postconviction relief, must fail because such claims are categorically unreviewable in that appellant had no right to effective assistance of postconviction relief counsel.

In his fourth point on appeal, the appellant contends that the motion court erred when it refused to "reappoint" counsel (App.Br.66). Specifically, appellant claims that postconviction relief counsel "abandoned" him by failing to plead in appellant's Rule 29.15 motion that trial counsel was ineffective for (1) failing to request that the jurors could not draw an adverse inference from appellant's silence during penalty phase; (2) failing to plead a claim regarding the "total breakdown in communication" between Kessler and Rosenblum; and (3) for failing to properly plead the issue regarding what trial counsel should have asked victim Carmalita about unadjudicated assaults appellant had inflicted upon her and what her responses to those questions would be (App.Br. 66). Appellant's argues that this Court should find that abandoned by his counsel by recognizing a third form of abandonment: that of "materially incomplete action" (App.Br.70).

There is, however, no constitutional right to counsel in a postconviction proceeding. *State v. Hunter*, 840 S.W.2d 850, 871 (Mo.banc 1992), *cert. denied* 509 U.S. 926 (1993); *Coleman v. Thompson*, 501 U.S. 722,752; (1991). Consequently, a postconviction movant has no right to effective assistance of counsel. *State v. Hunter*, 840 S.W.2d at 871.

For this reason, to the extent that appellant claims his postconviction counsel was ineffective, such a claim is "categorically unreviewable," *State v. Hunter*, 840 S.W.2d at 871; *State v. Ervin*, 835 S.W.2d 905,928-29 (Mo.banc 1992), *cert. denied* 507 U.S. 954 (1993); *Pollard v. State*, 807 S.W.2d 498,502 (Mo.banc), *cert. denied* 502 U.S. 943 (1991), and is not a cognizable claim on appeal. *See State v. Parker*, 886 S.W.2d 908,933 (Mo.banc 1994), *cert. denied* 514 U.S. 1098 (1995); *Wright v. State*, 14 S.W.3d 612,613 (Mo.App.,E.D. 1999). Therefore, appellant's claim that his post-conviction counsel was ineffective is without merit and should be denied.

With respect to his claim of abandonment, appellant also fails to assert grounds for relief. As stated above, Missouri courts do not recognize a claim of ineffective assistance of postconviction counsel, and the appellate courts will not broaden the scope of the abandonment concept to include perceived ineffectiveness of motion counsel. *State v. Hope*, 954 S.W.2d 537,545 (Mo.banc 1997). Abandonment occurs when (1) postconviction counsel takes no action on a movant's behalf and as such the record shows that the movant is deprived of a meaningful review of his claims, or (2) when postconviction counsel is aware of the need to file an amended postconviction relief motion and fails to do so in a timely manner. *Moore v. State*, 934 S.W.2d 289,291 (Mo.banc 1996); *Luleff v. State*, 807 S.W.2d 495 (Mo.banc 1991); *Sanders v. State*, 807 S.W.2d 493,494-495 (Mo.banc 1991). Appellant urges this Court to adopt a new avenue for showing abandonment by counsel: that of "materially incomplete action" (App.Br.70). However, as was discussed above, this Court has steadfastly refused to extend the forms of

abandonment. *See* *State v. Ervin*, 835 S.W.2d 905,928-29 (Mo.banc 1992).

Here, a claim of abandonment is not applicable to appellant's situation. As the above discussion shows, there are only two ways for abandonment to occur. Appellant is not raising either of these two in his brief on appeal.

Appellant also urges this Court to adopt the proposition that an appeal arising from a postconviction relief motion is a "first appeal of right," thus entitling him to the Sixth Amendment right to effective assistance of counsel (App.Br.73). This claim, however, has been soundly rejected by the Eighth Circuit Court of Appeals as well as the United States District Court for the Eastern District of Missouri. *See* *Burns v. Gammon*, 173 F.3d 1089,1092 (8thCir. 1999) (appellant argued that "with respect to claims of ineffective assistance of counsel, a Missouri postconviction trial court is the first court in which such claims could be made"); *Nolan v. Armontrout*, 973 F.2d 615,617 (8thCir. 1992) (rejecting the argument that a claim was not procedural barred even though the postconviction relief forum was the first opportunity to raise that claim); *Roberts v. Bowersox*, 61 F.Supp. 896,916 (E.D.Mo.1999) (rejecting a claim of ineffective assistance of postconviction counsel by finding that "[n]either can ineffective assistance of postconviction counsel serve as a cause to excuse a procedural default even if the postconviction proceeding was the first time petitioner could have raised the claim").

In sum, appellant's claim that his postconviction counsel was ineffective for failing to plead certain issues in the postconviction relief motion is a claim which is not cognizable in Missouri courts. Nor does appellant's case fall within the recognized acts

which constitute abandonment by postconviction counsel.

In light of the foregoing, appellant's fourth point on appeal must be denied.

V.

The motion court was not clearly erroneous in denying, after an evidentiary hearing, appellant's Rule 29.15 motion alleging ineffective assistance of penalty phase counsel for failing to investigate and call appellant's children to testify as mitigation witnesses because appellant failed to prove that his counsel acted unreasonably and appellant was not prejudiced in that counsel strategically choose not to call the children as they indicated a unwillingness to testify and their testimony would have been largely cumulative to the testimony presented during penalty phase.

Appellant alleges in his fifth point on appeal, the appellant contends that he received ineffective assistance of counsel based on counsel's "fail[ure] to investigate and call [appellant]'s children ... as mitigation witnesses" (App. Br.78). Appellant alleges that the children would have provided evidence that appellant "did many fun activities with [his children], taught them how to do things, and loved them deeply" (App.Br.78). Appellant's children were eight and six at the time of trial (Tr.590,650-52).

A. Facts

During the penalty phase, appellant's father testified that appellant was:

> very close to his kids. I have never seen - - He could not love his kids more. He spent time with them. He was - - He was always there and he did whatever it took to make sure that they were happy, that they had what they needed.

(Tr.1061). Appellant's father also testified that if appellant's life was spared, he would be able to talk with his children (Tr.1063-64). Appellant's step-mother also testified about the devotion appellant felt for his children:

A. ... His family has been the center of his life. I think--I think everything that he's done he's done with them in mind. He loves them tremendously and they love him.

Q. Have you been around [appellant] and his children?

A. Yes.

Q. How would you describe that relationship?

A. Oh, very good. Very good. They love their father and he loves them. There's no question about that. And I think anyone who knows [appellant] knows how much his family meant to him.

(Tr.1066).

Q. And do you have any doubt that [appellant] will be able to maintain some positive influence on his family if he were in jail the rest of his life?

A. Oh, there's no doubt. There's no doubt. I'm sure he would - - he would try to influence his children in a positive way. I'm sure he would try to influence them not to make the mistakes that he's made and to ... try to keep ... their emotions under control and not let their emotions control them. I know that would be important to him.

(Tr.1068-69). Appellant's brother testified in a similar manner that appellant loved his children (Tr.1074).

During the evidentiary hearing, penalty phase counsel testified that appellant's children:

Q. ... Did you make a determination whether or not you were going to use the children as witnesses...?

A. I did.

Q. And what did you determine?

A. The children, to me, were adamant that they didn't want to testify. His son spontaneously made comments that his dad did a bad thing.

[By PCR counsel]: Objection, Your Honor, hearsay.

THE COURT: I'll sustain the objection.

THE WITNESS: I listened to what the children had to say.

[PCR counsel]: Objection, Your Honor, there's no question in front of the witness.

THE COURT: I'll sustain it.

Q. [by the State]: I asked you - - did you ultimately use the children as witnesses?

A. No.

Q. And why did you not?

A. I though they would have hurt [appellant]'s - - I thought they would

have hurt the defense at that point. They indicated - - they told me that they didn't want to testify. ...

...

Q. Was it trial strategy not to use the children?

A. Yes.

(PCR.Tr. 213-14). Appellant's son, who testified by deposition, stated that he did not remember if Rosenblum talked to him during appellant's trial, but he did not remember being asked to testify for his father (MykaleDonald Depo.11-13). He stated that he "didn't know" whether he "loved" appellant "[b]ack at the time before [appellant's] trial" (MykaleDonald Depo.13). Mykale also testified about how he remembered appellant getting into a fight with another individual which resulted in appellant and his opponent becoming "bloody" and that he remembered appellant possessing various guns (MykaleDonald Depo.14-18). Testimony was also adduced about how Mykale now helped out his mother due to her blindness (MykaleDonald Depo.18).

Appellant's daughter, Symone, similarly testified at the evidentiary hearing by deposition. She testified that she did remember meeting Rosenblum and that he only talked to her for five or ten minutes (SymoneWinfield Depo.12). She did not remember whether she was asked to testify, but that she was willing to testify on her father's behalf (SymoneWinfiled Depo.13). She also testified about how different her mother's life is now "cause of what [appellant] did" (SymoneWinfield Depo.17).

The motion court, in its findings of fact and conclusions of law denying appellant's

claim, found that:

> ... Movant claims that trial counsel was ineffective for failing to call Mykale Donald as a witness during penalty phase of the trial. The testimony given by Mykale Donald during his deposition used in lieu of testifying at the PCR hearing was essentially cumulative of the evidence given during trial. ... Mr. Rosenblum testified that it was based upon trial strategy not to call Mykale Donald as a witness [PCR.Tr.213-14). ...Finally, during Mykale Donald's deposition testimony used in lieu of testifying at the PCR hearing, Mykale discussed other bad acts of [appellant]. Mykale described an incident where he went on an outing with his father and during the outing his father got into a fight using a bat as a weapon. He and his opponent were both bloody after the fight. Deposition of Mykale Donald at 14-15. ... This claim is denied as being meritless.
>
> ... Movant claims that trial counsel was ineffective for failing to call Symone Winfield as a witness during the penalty phase of the trial. The testimony given by Symone Winfield during her deposition used in lieu of testifying at the PCR hearing was essentially cumulative of the evidence given during trial. ... Mr. Rosenblum testified that it was based upon trial strategy not to call Symone Winfield Donald as a witness [PCR Tr.213-14]. .... This claim is denied as being meritless.

(PCR.L.F.283-84).

B. Standard of review

On appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." *Supreme Court Rule* 29.15(k).

In order to succeed on a claim for failing to investigate or interview a witness, the appellant must allege what information counsel would have discovered, that a reasonable investigation would have resulted in the discovery, and that the information would have aided or improved his position at trial. *State v. Clay*, 975 S.W.2d 121,143 (Mo.banc 1998), *cert. denied* 525 U.S. 1085 (1999). Similarly, in order to show that trial counsel was ineffective for failing to call a witness, the appellant must establish that the witness could have been located through reasonable effort, that the witness would have testified if called, and that the testimony of the witness would have provided a viable defense. *State v. Fanning*, 939 S.W.2d 941,948 (Mo.banc 1997).

C. Penalty phase counsel did not act unreasonably

Appellant has not shown that his trial counsel acted unreasonably. In order to show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," and that he was prejudiced by his counsel's failure to competently perform. *Wilson v. State*, 813 S.W.2d 833,835 (Mo.banc 1991).

Moreover, as the United State Supreme Court found in *Strickland v. Washington*, 466 U.S. at 690-91, strategic choices made after thorough investigation are virtually unchallengeable. "The introduction of evidence and selection of witnesses are matters of

trial strategy." *Rousan v. State*, 48 S.W.3d at 582. "A decision to not call a witness is presumed trial strategy unless clearly shown to be otherwise." *Id*. Likewise, "[t]here is no absolute duty to present mitigating character evidence." *Id*. at 583.

While dismissing trial counsel's efforts to investigate or addressing counsel's trial strategy, appellant claims that penalty phase counsel was ineffective in his investigation. He likens this case to *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where, appellant claims, defense counsel was found ineffective for failing to discover and present additional mitigating evidence (App.Br.81). Appellant's reliance upon *Williams*, however, is misplaced.

In *Williams*, the defense did not begin preparing for penalty phase until a week before trial. *Id*. at 1514. The attorneys failed to conduct an investigation that would have uncovered the defendant's "nightmarish childhood," including the fact that the defendant's parents had been imprisoned for the criminal neglect of the defendant and his siblings, that the defendant had been severely and repeatedly beaten by his father, that the defendant had been committed to the custody of social services for two years, that the defendant had been placed in an abusive foster home, that the defendant was "borderline mentally retarded" and did not advance beyond sixth grade, and that the defendant had aided the police in breaking up a drug ring in prison. *Id*. The defense attorneys also failed to return the telephone call of a favorable witness who offered to testify on the defendant's behalf. *Id*. Moreover, at trial, the only mitigating argument that was advanced by counsel was that the defendant had "turned himself in, alerting the police to a crime they otherwise would never have

discovered, expressing remorse for his actions, and cooperating with the police after that." *Id*. at 1514. During penalty phase, the defendant's mother and two neighbors (one of which was pulled from the court audience without ever being interviewed beforehand) testified that the defendant was a "nice boy" and not violent. *Id*. at 1500. There was also "psychiatric evidence" admitted that only consisted of a tape recorded excerpt of a psychiatrist relating how the defendant had told that "in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone." *Id*.

In contrast to the *Williams* case, appellant's penalty phase counsel took reasonable and sufficient steps to investigate appellant's children as potential witnesses. He asked them whether they would like to testify, and, in getting a negative response, counsel wisely refrained from putting appellant's children on the witness stand. Refusing to call reluctant children to testify was reasonable on trial counsel's part.

Moreover, appellant has nor established that the children would have testified in support of appellant. Trial counsel testified at the evidentiary hearing that he interviewed the children and they were not willing to testify (PCR.Tr.213-14). Trial counsel also testified that he did not feel that the children would support the defense (PCR.Tr.213-14). "When defense counsel believes a witnesses' testimony would not unequivocally support his client's position, it is a matter of trial strategy not to call him to the stand, and the failure to call such witness does not constitute ineffective assistance of counsel." *Rousan v. State*, 48 S.W.3d at 587. As was discussed above, appellant's son Mykale had conflicted emotions about appellant. It was reasonable trial strategy to not allow the jurors to hear

that.

All these circumstances indicate that appellant's children were not called as a part of penalty phase counsel's reasonable trial strategy. Appellant has not established that he received ineffective assistance of counsel.

D. Appellant was not prejudiced

Finally, even if penalty phase counsel did not investigate appellant's children and should have called them during the penalty phase, appellant was not prejudiced as there is no reasonable probability that their testimony would have changed the sentence imposed by the jury. To show prejudice, appellant must establish that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. *State v. Shurn*, 866 S.W.2d 447,455 (Mo.banc 1993), *cert. denied* 513 U.S. 837 (1994). Under *Strickland*, a reasonable probability is that sufficient to undermine the confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694. Moreover, "[t]o prove ineffectiveness with regard to death penalty sentencing, [appellant] must show, that but for his counsel's ineffective performance, there is a reasonable probability that the jury would have concluded after balancing the aggravating and mitigating circumstances, death was not warranted." *Rousan v. State*, 48 S.W.3d at 582.

Had counsel called the children to the stand to testify in mitigation of appellant's punishment, the children would have been cross-examined by the State. It is reasonable to presume that the prosecutor for the State would have questioned the children regarding the trauma they experienced when they heard their father had shot their mother in the face in an

attempt to kill her. It is also reasonable to presume that the State would have questioned the children about the changes in their lives they have had to undergo due to their father permanently blinding their mother.

Trial counsel, by calling the witnesses that he did, was able to elicit testimony that appellant cared deeply about his children, without having to put forth reluctant children whose testimony may have ultimately damaged appellant's plea for leniency. Thus, the jurors were able to hear testimony regarding the devotion that appellant felt for his children. In short, even if counsel had managed to present a few additional anecdotal details of appellant's life with his children, there is not reasonable probability that the outcome of appellant's trial would have been different.

In light of the foregoing, appellant's fifth point on appeal must be denied.

VI.

The motion court was not clearly erroneous in denying, after an evidentiary hearing, appellant's Rule 29.15 motion alleging trial counsel was ineffective for failing to investigate and present mitigating evidence of appellant's "complete life history" by not calling witnesses Katherine Patton-Bennett, Maurice Patton, Darrell Jefferson, Frank Elliot, and John Sutherland, Jr., because appellant failed to prove that his trial counsel, who, after thorough investigation, adduced adequate testimony from family members, acted unreasonably and appellant was not prejudiced in that the evidence would have either been cumulative to other evidence presented or without consequence and there is no reasonable probability that there would have been a different result in the penalty phase.

In his sixth point on appeal, the appellant contends that he received ineffective assistance of counsel based on trial counsel's decision to not call Katherine Patton-Bennett, Maurice Patton, Darrell Jefferson, Frank Elliot, and John Sutherland, Jr.[4] (App.Br.87). Appellant argues that these witnesses would have provided evidence of appellant's "complete life history" in the penalty phase (App.Br.87). Appellant contends that these witnesses would have provided testimony that (1) appellant collected comic book

[4]Appellant also asserts that trial counsel should have obtained information regarding his "complete life history" from his brother, David Winfield. David Winfield, however, testified at trial as a mitigation witness (Tr.1072-1081).

and stored them in plastic covers; (2) appellant played football a child and frequently rode his bike to practice; (3) appellant encouraged his cousin to become an artist; (4) appellant had the "weight of the world on his shoulders," (5) appellant lost a child to Sudden Infant Death Syndrome; (6) appellant loved spending time with his children; and (7) in the weeks before the murders, appellant's mother was hospitalized due to a spider bite, his brother was injured in an accident, his grandmother was depressed, and appellant was trying to buy a house in Gary, Indiana and move his girlfriend and their children there (App.Br.86-87).

A. The evidentiary hearing

An evidentiary hearing was held on May 4, 2001. At this hearing, trial counsel testified in person and Katherine Patton-Bennett, Maurice Patton, Darrell Jefferson, Frank Elliot, and John Sutherland, Jr. testified by deposition.

1. Katherine Patton-Bennett

Ms. Patton-Bennett testified that appellant had little contact with his father as he was growing up (Bennett Depo.10). She testified about appellant's "complete life history," such as the fact that appellant attended church as a child and was an alter boy in his church (Bennett. Depo.15); that appellant became the man of the house in his teenage years (Bennett Depo.20); that a child of his died from Sudden Infant Death Syndrome and this affected appellant "deeply" (Bennett Depo.32-33); that his grandmother was depressed and had tried to kill herself (Bennett Depo.20); that appellant loved his children (Bennett Depo.29); that appellant allowed Carmel's family to live with them (Bennett Depo.30,31). Ms. Patton-Bennett also testified that although appellant and Carmel were "due to be

married," they did not have a future together (Bennett Depo.47); that during the summer of 1996, appellant's mother was bitten by a spider and was hospitalized for "two months" (Bennett Depo.50);[5] that appellant was deeply upset by his mother's illness (Bennett Depo.52); that appellant's brother was in an accident and injured himself during the summer of 1996 (Bennett Depo.57). She stated that she had not been contacted by appellant's trial counsel (Bennett Depo.64); and that although she was not present at appellant's trial, she would have testified had she been asked (Bennett Depo.66). Ms. Patton-Bennett also testified that appellant had been a good student in school, getting A's or B's in his courses (Bennett Depo.19).

During the cross-examination of Ms. Patton-Bennet, evidence was introduced that appellant was not an "A" or "B" student, but rather that appellant was a below average student who received "C's", "D's" and even "F's" in his courses (Bennett Depo.73). She also admitted that she did not know that appellant was involved in a sexual relationship with as another women, Beverly Thornton, and had fathered a child with her in close proximity to the time of the murders (Bennett Depo.80). She also said that she had not been able to visit

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[5]There was much confusion about the length of time that appellant's mother was actually hospitalized. Dr. Stacy, who performed a psychiatric evaluation upon appellant, testified that the medical records indicated that she was only hospitalized for eleven days (Stacy Depo.31). Counsel can hardly be deemed ineffective for not putting in information that even witnesses could not come to a consensus on.

appellant while he was in jail (Bennett. Depo.85), and that she had not talked to appellant about the shootings (Bennett Depo.86). She also admitted that appellant was not "close" to her sons, Mario and Maurice Patton, anymore (Bennett Depo.87).

2. Maurice Patton

Maurice Patton testified that he grew up with appellant (Patton Depo.6). He stated that appellant was close to his mother and grandmother (Patton Depo.11); that appellant was the "provider" and "man of the household" (Patton Depo.12,18); that appellant played football as a youth (Patton Depo.13); that he influenced Mr. Patton to become an artist (Patton Depo.15-16); that he believed appellant had graduated from highschool (Patton Depo.18).[6] Mr. Patton stated that he moved to Chicago for college (Patton Depo.24,28), and that he did not see appellant during 1996 (Patton Depo.25); that he had not been contacted by appellant's attorney, but that he would have testified had he been called (Patton Depo.26-27).

During the State's cross-examination, appellant admitted that once he moved away from St. Louis in 1995, he did not speak with appellant much and they grew apart (Patton Depo.29-30). He testified that at the time of appellant's trial, he was living in Chicago and

[6]Dr. Stacy, the psychiatrist who examined appellant did not find any records to support the family's belief that appellant ever graduated from high school. In fact, Dr. Stacy was not able to find any evidence that appellant had graduated from high school (Stacy Depo.122-23).

did not attend because he was graduating at that time and "there was a lot going on in Chicago" (Patton Depo.32). Mr. Patton also stated that he never talked to appellant on the telephone since he was incarcerated in the county jail, nor has he visited him since he was in jail (Patton Depo.33-34)

3. Darrell Jefferson

Darrell Jefferson, a friend of appellant, testified that he was "real close" to appellant (Jefferson Depo.18). He stated that appellant was close to his mother and grandmother (Jefferson Depo.11-12); that appellant and appellant's father "were real close" and had an "excellent" relationship (Jefferson Depo.14); that appellant took care of his children (Jefferson Depo.16,25); that appellant was devastated when his infant child died (Jefferson Depo.16); that appellant maintained the household (Jefferson Depo.18); that appellant's mother was hospitalized in 1996 (Jefferson Depo.19); that appellant and Carmel were the "ideal couple" and "everybody wanted to be like them" (Jefferson Depo.21). Mr. Jefferson also testified that appellant had "bought" a home in Indiana (Jefferson Depo.28); and appellant seemed like the "happiest man in the world" the last time he and Mr. Jefferson had talked before the murders (Jefferson Depo.30); that appellant and Carmel had talked "for years" about getting married (Jefferson Depo.33). Mr. Jefferson stated that he had not spoken to appellant's trial counsel about testifying, but the he would have testified for appellant (Jefferson Depo.40-41). Mr. Jefferson admitted that he had a prior drug conviction (Jefferson Depo.40).

During the State's cross-examination, Mr. Jefferson testified that he did not know

whether appellant had a prior conviction (Jefferson Depo.43); but then admitted that he had "heard some things about" appellant's prior conviction (Jefferson Depo.43). Mr. Jefferson also claimed that appellant and Carmel did not have an open relationship where they dated other individuals (Jefferson Depo.43).

4. Frank Elliot

Frank Elliot also testified that he had known appellant for over twenty years (Elliot Depo.7); that appellant was raised by his mother and was extremely close to her (Elliot Depo.11); that appellant became the man of the house as a teenager (Elliot Depo.11); that Carmel and appellant had previous problems with her seeing other men (Elliot Depo.16); that Carmel had revealed to appellant in the past that she was involved in sexual relationships with other men (Elliot Depo.20); that appellant and Carmel had a relationship that was "on and off" (Elliot Depo.21); that appellant loves his children (Elliot Depo.24); that appellant took it hard when his infant child died (Elliot Depo.27); that appellant had the "weight of the world" on his shoulders (Elliot Depo.28); that appellant's mother faced a serious illness in 1996 (Elliot Depo.30); that appellant's grandmother was suffering from depression and had tried to kill herself (Elliot Depo.33). Mr. Elliot also testified that appellant's brother had been injured, but he wasn't sure whether appellant had helped his brother out during that time (Elliot Depo.34); that he was not contacted by appellant's attorney (Elliot Depo.35); that he would have testified had he been asked (Elliot Depo.35); that he had not spoken to appellant since the shootings (Elliot Depo.44); and that he was not aware of the child appellant had fathered with another women a few months before the time

of the shootings (Elliot Depo.44).

5. John Sutherland, Jr.

John Sutherland testified that he and appellant had been friends since grade school (Sutherland Depo.6). He stated that appellant and his father "seemed close" (Sutherland Depo.10); that appellant loved his children (Sutherland Depo.11); that he and appellant were "pretty tight" and "best friends" (Sutherland Depo.11); that appellant's mother faced a serious illness in 1996 and that appellant "took it pretty hard" (Sutherland Depo.12-13); that appellant ran the household (Sutherland Depo.14); that appellant's brother was injured in an accident, and although "he did not need much help," appellant "looked in on him (Sutherland Depo.16); that appellant took it "pretty hard" when his son died (Sutherland Depo.20); that appellant told him that he had "bought" a house in Indiana (Sutherland Depo.23); that appellant seemed "serious" about marrying Carmel (Sutherland Depo.26); that appellant was not the kind of person who let things build up inside, but rather spoke his mind (Sutherland Depo.29). Mr Sutherland also testified that appellant believed the two murder victims, Arthea and Shawnee, "took up too much of [Carmel's] time" (Sutherland Depo.30). Mr. Sutherland admitted that he has prior convictions (Sutherland Depo.31); that he was contacted by appellant's trial counsels "shortly after everything happened," who wanted him to testify as a character witness for appellant, but who later changed their minds because of Mr. Sutherland's prior convictions (Sutherland Depo.31). Mr. Sutherland said he was interviewed so that trial counsels could learn what type of person appellant was (Sutherland Depo.32);

During the State's cross-examination, Mr. Sutherland admitted that he did not know of appellant's prior convictions (Sutherland Depo.35); that he did not know how much, if any, appellant had paid down on the house in Indiana (Sutherland Depo.36); that appellant and Carmel had had an open relationship where they date other individuals (Sutherland Depo.36).

6. Trial Counsel

Trial counsel testified at the evidentiary hearing (PCR.Tr.191). He testified as follows:

> Q. Now, I'm going to talk to you about presenting evidence regarding the life history of [appellant].
>
> A. Okay.
>
> Q. Had you attempted to obtain information regarding his background?
>
> A. Sure

(PCR.Tr.195).

> A. ... One of the first things I did [when Rosenblum became penalty phase counsel] was meet with the family, Evelyn, John, talked about witnesses that could develop his lifestyle, talked about witnesses that we thought could be useful in the second phase.
>
> ...
>
> Q. And were there lay witnesses as well?
>
> A. Yes, there was probably at least three, if not more occasions that I can

recall where I would have a group of people in my office. We would sit around a conference table, and I would individually go over their testimony.

I also had contact with [appellant's father]. I think I was probably the only one who had contact with [him]. I know I had fairly frequent phone contacts with [him]. I met him initially, early on in the case. And his recollection would probably be better than mine. I know I met him on at least one or two other occasions before the trial where he actually came to St. Louis with his wife, and I discussions with [them].

I sat down with [appellant] on numerous occasions and talked about people who were important to him and people he thought would be beneficial in his life.

... [M]y theory of the second phase defense was going to be, the plan was to [show] ... a normal person that seemed to have snapped.

Now, I was relying on - - I was hopeful I was going to be able to call [appellant's mother and grandmother]. ...

Q. Now, the witnesses that [appellant] gave you, did you investigate all those witnesses?

A. Every person that [appellant] provided to me, I investigated. Now, there were some witnesses that he provided to me that I made- - in my mind, I didn't want to call. And I discussed withe John, I discussed my reasons with [appellant].

...

I spoke with his friend [John Sutherland] ... [a]nd in my mind, although he was a perfectly nice person, he did not present the consistent family theme that I wanted to present. He had a prior criminal involvement, a record, and he just didn't- - I just didn't think he would be beneficial because of that.

(PCR.Tr.201-205). Trial counsel also testified that he had planed to call appellant's grandmother and mother to testify as penalty phase witnesses (PCR.Tr.205-206). Trial counsel stated that he "begged" appellant's mother and grandmother not to go through with the State's depositions that were scheduled as discovery for appellant's "alibi" defense (PCR.Tr.206). Trial counsel testified that the alibi defense was a fabrication and that if they testified to it, trial counsel would not be able to call them as witnesses for fear they would be impeached; and that since appellant's mother and grandmother did give perjured depositions, this affected his trial strategy in the penalty phase (PCR.Tr.206,300). Trial counsel also stated that:

... I remember at the end of the witnesses that I called- - and they were not all the witnesses that I would have liked to have called.

When I was formulating the theory of defense for the second phase, I wanted to present a more complete picture of what [appellant] meant, about how he basically took over the surrogate husband/father role for his mother, for his grandmother. ...

Q. Let me stop you there. Did you tell him this is the evidence you intend to put on during the second phase?

A. Yes. Well, in addition to the evidence that- - I called [appellant's father and step-mother], and I believe Rosalie Bell, and his brother David

(PCR.Tr.210). Trial counsel testified that he had tried to schedule "a number" of meetings three to four weeks before the trial, but was unsuccessful (PCR.Tr.212). During his testimony at the evidentiary hearing, trial counsel also stated how he was hindered in preparing witnesses for the penalty phase:

Q. ... [Y]ou had discussions with [appellant] about the second phase of evidence; is that correct?

A. Yes.

Q. And when you were having those discussions. You talked about the different witnesses and different evidence you were intending to put on; is that correct?

A. Yes.

Q. And did you put on that evidence?

A. I did not put on the evidence that I wanted to put on for reasons that developed as we got closer to trial. Had I put on all the evidence I wanted to put on, I would have put on the four witnesses that I put on, plus [appellant's mother and grandmother], ...

(PCR.Tr.229).

Q. The last thing I want to talk to you about regarding the penalty phase is, I want to go back and talk about presenting evidence regarding the complete life history. Why did you choose the evidence you did ... regarding the life history of the defendant?

A. My preference would have been to bolster the life history through his mother and grandmother. I thought they would have been better to speak to their family. They were more of a close family. They had more family dynamics than [appellant's father]. [His father] had moved to Indianapolis, and although was involved in the family, it was more at a distance and there was – it wasn't always healthy or good. There were some problems in that relationship.

I would have chosen to put it on through those individuals. Once they went forward with the depositions – it was at that point, after I got the ruling from the Court, that the prosecutor was going to be able to get into – was not going to be limited to just what I brought out on direct.

In other words, she is going to go outside the scope of the direct examination to include previous statements under oath that may be false or that would have been false, and the jury would have known they were false.

Q. You read the amended motion, is that correct?

A. It's been awhile.

Q. And there is an indication in there that there was an allegation that you should have brought out about [appellant's mother] having been bit by a spider and the impact that had on him; is that correct?

A. Yes.

Q. Would that – did that ever become an issue?

A. You know, I sat down with [appellant] on a couple of occasions, on more than a couple of

occasions, and talked at length about what's going on in his life, is there something out there that we need to know about, something out there that we need to uncover.

And had [appellant] indicated to me that that was something that was going on that was affecting him, I would have developed and I would have introduced it as evidence. I think I was aware of it because [his mother], I think, was possibly having difficulties getting to my office or something of that nature.

...

Q. (By Mr. Livergood) So you were aware of it, is that correct?

A. As I'm sitting here, I think I was aware of it, yes. I have a recollection that I was aware of it, and I think it came from [appellant's mother].

Q. And you chose not to put on that evidence?

A. Well, [appellant] didn't indicate to me that it was something that was going on that was affecting him emotionally. And once I decided not to call [his mother], there would have been no other way I could have got that evidence in.

Q. And did he indicate that that had an impact on his life?

A. No.

Q. Then there was questioning about his brother being partially paralyzed for a while?

A. Uh-hum.

Q. Did he ever indicate to you that that had an impact on his life?

A. No. Are you talking about David, who testified?

Q. Yes.

A. No. He never – I don't even think David mentioned it to me, and I spent several hours talking to

David about his life.

(PCR.Tr.236-39).

Q. During the penalty phase, did you also have a theme that you were using?

A. The theme that I tried to develop there is just to show [appellant] as the central figure in a family that was for whatever reason, certainly not by his choice, circumstances caused him to be separated by his father, to be somewhat abandoned by his father.

He didn't have the input of his father, who was extremely successful and a very, very impressive person, and that [appellant] was assuming these roles within his immediate family, that he may have been – he may have been over his head, and the effect, you know. And how his relationship developed then as sort of the surrogate man of the house with his brother, his mother, his grandmother, his play sister, his play niece, and the things that he did and didn't do.

And in that regard, just really present his family history and show him as a human being and show him as a loving, caring individual that is worthy of having his life saved.

...

Q. And the just to wrap it up, the life history that you presented of the defendant, was that based on your trial strategy?

A. Yes. I mean, it was based on my trial strategy at the time. It was not the life history I would have wanted to present, but for reasons that I have discussed, I made these decisions at the time because I thought strategically it was the right decision to keep these individuals out. ...

(PCR.Tr.242-44)

During the appellant's cross-examination of trial counsel, he testified that did not

interview Katherine Patton-Bennett, Maurice Patton, and Darrell Jefferson (PCR.Tr.317). Trial counsel could not remember whether he interviewed Frank Elliot (PCR.Tr.317). He did interview Mr. Elliot's wife, Marsha, and believed that Marsha may have arrived at the interview with a relative who may have been Mr. Elliot (PCR.Tr.317). Trial counsel did interview John Sutherland, but believed that Mr. Sutherland would not fit the image he was trying to paint to the jurors of appellant's and trial counsel felt Mr. Sutherland would make an "effective witness" (PCR.Tr.318-19).

During the State's re-direct examination of trial counsel, further questions were asked regarding his trial strategy for the penalty phase:

> Q. Now, you were asked about witnesses that you didn't call and witnesses that you did call. ... Did [appellant] give you witnesses that he wanted you to call?
>
> A. Between [appellant] and [his mother], a number of meetings I had with them is where I came up with the witnesses that we wanted to focus on. There were some other witnesses that were mentioned, and it is my understanding that after talking to either [appellant of his mother], it was in my mind that they didn't really fit into the theory of my defense.
>
> And basically, they were going to offer more of bad character information about [the victim, Carmel], and I wasn't interested in alienating a jury with talking poorly about a victim. I don't think that is a good idea.
>
> Q. So witnesses that you didn't- - that you did not call was based on trial

strategy?

A. Either trial strategy or because they were not made known to me at the time.

Q. Then particularly about [appellant's] mother and his grandmother testifying - -

A. I absolutely wanted then to testify. In fact, they were going to be the cornerstone presentation in the penalty phase. That's why it was so distressing to me that, against my advice, ... they were going forward and they were going to testify under oath in a deposition that they were present with [appellant] at the time of the crimes, which to me was going to be extremely damaging, in addition to having possible other ramifications for them.

(PCR.Tr.342-43).

B. The motion court's findings of fact and conclusions of law

In denying appellant's claim, the motion court, in its findings of fact, stated:

> In Paragraph 8(A) of [appellant]'s Amended Motion, he claims that trial counsel failed to present to the jury [appellant]'s complete life history during the punishment phase of [appellant]'s trial. [Appellant]'s petition provided a lengthy dissertation of [appellant]'s family history from his birth to the present. Many of the facts that [appellant] lists in his claim ... were, in fact, elicited during trial:
>
> a) In the penalty phase, [trial counsel] called [appellant's father, John

Edmond] to testify on behalf of [appellant] [Trial Tr.1055]. Mr Edmond testified as to [appellant]'s life history. Id. at 1055-57. This included the relationship that [appellant] had with his father, his mother, [his step-mother, Marsha Edmond], his grandmother, his children and Carmel. Id. at 1055-57. Mr Edmond provided the jury with photographs of [appellant]. Id. at 1057. Mr. Edmond testified as to the relationships that [appellant] had with other family members, including his children. Id. at 1058,1061. Mr. Edmond also described [appellant] as the man of the house who had to take charge. Id. at 1058. Mr. Edmond spoke of his love for [appellant]. Id. at 1062-63. Mr. Edmond also spoke of taking [appellant]'s children to visit him in the future while [appellant] was in prison. Id. at 1063.

b) [Appellant]'s life history was also described by Marsha Edmond, the wife of [appellant]'s father. She described [appellant] as the rock of the family. Id. at 1066. She also described how he loved his children, and how they loved him. Id. Ms. Edmond described the relationship that [appellant] had with his family. Id. at Tr.1066-67.

c) Next, [trial counsel] called Rosella Bell to describe [appellant]'s life history. Id. at 1070]. She described [appellant]'s relationship with his family. Id. at 1070-71. Ms. Bell also described teaching [appellant] in Sunday school and vacation bible school. Ms. Bell testified that [appellant]'s family depended upon him. Id. at 1066-67.

d) [Trial counsel] called David Winfield, [appellant]'s brother, to testify about [appellant]'s family history and his relationships with them. Id. at 1072. He also indicated that the family depended upon [appellant]. Id. at 1075.

e) [Trial counsel] indicated that he did not call [appellant's mother,] as a result of trial strategy. Id. at 1087-88.

f) [Appellant]'s life history was also conveyed to the jury by [trial counsel] through the cross-examination of Carmelita Donald. Ms. Donald testified as to the relationship of [appellant] with his children ... Id. at 1038. She testified that [appellant] loved his children. Id. She also testified about the relationship that [appellant] and his family had with the children. Id.

[Trial counsel] investigated every witness given to him by [appellant] regarding the penalty phase of trial [PCR Tr.204]. [Trial counsel] then evaluated those witnesses as to whether to elicit their testimony. Id. He discussed this with [appellant]. Id at 204-5. ... [Trial counsel] selected the witnesses to call and exclude others as a matter of trial strategy. The Court finds this claim is without merit and is denied.

(PCR L.F.275-77) (footnotes omitted)

C. Standard of Review

On appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." *Supreme Court Rule* 29.15(k).

The selection of witnesses are matter of trial strategy. *State v. Clay*, 975 S.W.2d 121,143 (Mo.banc 1998), *cert. denied* 525 U.S. 1085 (1999). Strategic choices made after thorough investigation are virtually unchallengeable. *State v. Davis*, 965 S.W.2d 927,931 (Mo.App.,W.D. 1998).

D. Counsel's performance was not deficient

The motion court did not clearly err in denying appellant's claims of ineffective assistance of counsel for failure to present appellant's "complete life history." Counsel has a duty to make a reasonable investigation of possible mitigating evidence or to make a reasonable decision that such investigation is unnecessary. *State v. Harris*, 870 S.W.2d 798,815 (Mo.banc 1994); *cert. denied* 115 S.Ct. 371 (1994). Counsel's presentation of penalty-phase evidence is a matter of professional judgment. *State v. Clemons*, 946 S.W.2d 206,223 (Mo.banc 1997), *cert. denied* 118 S.Ct. 416 (1997). "Defense counsel is under no obligation to present the defendant's background in mitigation in a death penalty case, and defense counsel certainly need not present cumulative evidence of his background." *State v. Clay*, 975 S.W.2d at 145; *State v. Richardson*, 923 S.W.2d 301,329 (Mo.banc 1996), *cert. denied* 117 S.Ct. 403 (1996).

Here, counsel testified that he interviewed appellant's mother, father, step-mother, grandmother, brother, and friends. Trial counsel testified that he interviewed those witnesses that were made known to him (PCR Tr.204). Trial counsel also testified that he asked appellant about the events that had occurred in his life (PCR Tr.236-39). Thus, as trial counsel made a reasonable investigation into appellant's life, appellant cannot

overcome the strong presumption that counsel's decisions reflected sound trial strategy. State v. Jones, 979 S.W.2d 171,180 (Mo.banc 1998), *cert. denied* 525 U.S. 1112 (1999).

Furthermore, after interviewing appellant's friend, John Sutherland, trial counsel made a reasonable decision to not call him as a witness as he had a criminal record. This strategic decision also includes any other friend of appellant's who had a criminal record. Trial counsel theory of defense was that appellant was an upstanding individual who snapped, and trial counsel felt that showing appellant associated with convicted felons would not assist in his defense. If counsel believes that the witnesses' testimony would not unqualifiedly support the defense, the decision whether to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel. State v. Jones, 885 S.W.2d 57,58 (Mo.App.,W.D. 1994); *see also* State v. Dixon, 969 S.W.2d 252,258 (Mo.App.,W.D. 1998).

Likewise, there is no credible indication in the record that appellant ever informed his trial counsel of the existence of many of these people or of the events that were allegedly occurring in his life. Counsel testified that he actively sought out information about appellant to no avail. Additionally, testimony from appellant's own medical expert indicates that appellant was working against his trial counsel, and rather than informing his of the "stressors" in his life, was counteracting his counsel's investigation by trying to paint himself as a "paragon of mental health" (Stacy Depo.121).

Appellant and his family also hampered trial counsel's investigation by having appellant's mother and grandmother give perjured depositions. This placed trial counsel in

the awkward position of being a few short weeks from trial and having to come up with a new set of penalty phase witnesses. Appellant, incredibly, argues that trial counsel "still had two weeks in which to look elsewhere for details about [appellant's] life" (App.Br.89). The futility of having to research and come up with witnesses at the last minute speaks for itself. Trial counsel's actions of using the four character witnesses that he was left with to paint the picture of appellant's life was entirely reasonable. Trial counsel was faced with unfavorable alternatives, such as put on character evidence from convicted felons, which would have irreparably damaged the image the defense was trying to portray, or put on witnesses who counsel did not have enough time to investigate and prepare, and risk the chance that the State would have been able to impeach the last-minute witnesses. "In any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy burden of deference to counsel's judgment." *Strickland*, 466 U.S. at 691. Trial counsel can hardly be deemed to have acted unreasonable considering the no-win situations that appellant and his family had placed him in.

In his brief on appeal, appellant argues that the "State will likely try to excuse [trial counsel's] lack of investigation by referring to this Court's recent decision in *Ervin v. State*" (App.Br.89). Appellant is correct that the State will rely on a case that is directly on point and refutes his claim. In *Ervin*,:

> defense counsel investigated Ervin's family and his social life and psychological background via interviews with Ervin and his mother. He also

> procured Ervin's medical records and psychological history. He then hired to psychologists to evaluate Ervin and furnish him with a report of their findings. None of this investigation by counsel yielded a clue that any additional mitigating evidence would be forthcoming by interviewing Ervin's siblings or additional family. Given the scope of defense counsel's investigation of Ervin's family, social, and psychological background and what it revealed, Ervin's counsel acted reasonably when he opted to forgo interviewing additional family members. In the circumstances here, it was not unreasonable for counsel to decide against interviewing Ervin's family members as all signs, at the time of counsel's decision, indicated that further investigation into Ervin's background would be cumulative.

Id., — S.W.3d —, No.SC83459, 2002 Mo. LEXIS 76,*13 (Mo.banc June 25,2002) (slip op.).

Not only is *Ervin* squarely on point and controlling in the case at bar, but the investigation performed by appellant's trial counsel closely parallels that of Ervin's counsel. In both cases, trial counsel interviewed the defendants and their mothers. In fact, trial counsel in the case at bar may have even went further in his investigation than did Ervin's counsel—evidence was presented that appellant's penalty phase counsel also investigated appellant's friends and other family members, including appellant's grandmother, father, step-mother, brother, "play sister," and "play niece. Both trial counsels consulted *two* experts for psychological evaluations, which revealed that nothing

further would be gained by expanding the investigation. Thus, this Court's conclusion that Ervin's counsel "acted reasonably when he opted to forego interviewing additional family members," is also applicable here as well.

Trial counsel was not unreasonable in his investigation and presentation of appellant's "complete life history," and appellant could, therefore, not have received ineffective assistance of counsel.

E. The testimony of the proposed witnesses would have been cumulative

Appellant argues that he was prejudiced by his counsel's decision not to call his proposed witnesses at trial in order to present his "complete life history" (App.Br.87). However, trial counsel presented four witnesses, three of whom were family members, who were able to testify about positive aspects of appellant's life: appellant's father, brother, and step-mother all testified about appellant's close relationship with his family and his love for his children in penalty phase.

This testimony provided the jury with an adequate view of appellant's background, and some of the alleged additional evidence would have been cumulative.

1. Testimony about appellant's interests as a child

Appellant argues, however, that he was prejudiced because specific testimony that he collected and preserved comic books and participated in sports, often riding his bike to practice, as not admitted into evidence (App.Br.86-87). Appellant's father, however, did provide the trial court with evidence of appellant's childhood in the most vivid manner available – through photographs of appellant as he "progressed from a boy to a man"

(Tr.1057). Testimony was also presented from a family friend with whom appellant attended church about (Tr.1070). Ms. Rosalie Bell testified that she had taught the appellant as a child in Sunday school and that she had known him all his life (Tr.107). Moreover, all these witnesses called to testify indicated that they would be involved with appellant had the jury decided to spare his life (Tr.1064,1069,1070-71).

To the extent that appellant argues he was prejudiced because his trial counsel did not call other witnesses to testify about appellant's life as a youth, his claim fails as his testimony would have been cumulative to the testimony presented at trial. "Failing to present cumulative evidence is not ineffective assistance of counsel." *State v. Johnston*, 957 S.W.2d 734,755 (Mo.banc 1997), *cert. denied* 522 U.S. 1150 (1998). *See also State v. Kinder*, 942 S.W.2d 313,335 (Mo.banc 1996), *cert. denied* 522 U.S. 854 (1997); *State v. Clay*, 975 S.W.2d at 145; *State v. Taylor*, 929 S.W.2d 209,224 (Mo.banc1996), *cert. denied* 519 U.S. 1152 (1997) (all cases where this Court held that the appellant did not receive ineffective assistance of counsel for failure to present cumulative mitigation evidence during the penalty phase of a capital trial).

2. The testimony of appellants relationship with his family.

Appellant further argues that he was prejudiced because the jury was not presented with testimony about his relationship with various family members and children. Appellant argues that evidence that he helped his cousin develop into an artist, that he was the man of the house and even provided for Carmel's family, that he was devastated when he lost his

son, and that he loved playing with his children, would not have been cumulative (App.Br.86-87).

As was set out in Point V, however, mitigation testimony was presented about appellant's devotion to his family. Appellant's father, step-mother, brother and church friend all testified about how close appellant was to his family, and especially his children (Tr.10581061,1066,1068,1071,1074). Testimony was also introduced that appellant was "the rock of the family (Tr.1066), that he was the "provider" (Tr.1061). Additionally, appellant was not prejudiced in that further testimony may have provided the jury with negative evidence. For instance, in his deposition, appellant's own father let it slip that his son could be described as a "manipulative schemer" (Edmond Depo.25).

To the extent that appellant argues he was prejudiced because his trial counsel did not call other witnesses to testify about appellant's devotion to his family and children. his claim fails as his testimony would have been cumulative to the testimony presented at trial. *See* State v. Johnston, 957 S.W.2d at 755; State v. Kinder, 942 S.W.2d at 335; State v. Clay, 975 S.W.2d at 145; State v. Taylor, 929 S.W.2d at 224.

3. The testimony about the stressful events occurring in appellant's life before the murders

Appellant also alleges that his proposed witnesses would have provided mitigation testimony that in the weeks preceding the murders, appellant's mother was bitten by a spider and became seriously ill, his grandmother was suffering from depressions, his brother was injured in an accident and appellant was planning on buying a house in Indiana

so that he, Carmel and their children could move there (App.Br.87).

Trial counsel acted reasonably to not introduce evidence regarding appellant's mother's illness and grandmother's depression and the purchase of the home in Indiana because evidence was introduced at the postconviction relief hearing that appellant left his mother while she was allegedly in serious condition and needing transportation to the hospital in order to go to Gary, Indiana (Stacey Depo.154). Counsel could reasonably believe that, hearing evidence that appellant was in the midst of the land purchase at the time his mother was supposedly ill would have a negative appearance of appellant "running away" and abandoning his mother when she allegedly needed him the most (*See* PCR.Tr.155).

Likewise, the witnesses that provided much of the evidence regarding the alleged house purchase and that moving away from his mother and grandmother was a factor of his "extreme emotional disturbance," are of individuals whom trial counsel explicitly stated he would not call as these individuals—John Sutherland and Darrell Lamont Jefferson—each had prior convictions.

Additionally, appellant's brother, the person in the best position to testify about his injury, did testify during penalty phase (Tr.1072). Counsel cannot be deemed ineffective for not eliciting testimony that he was not aware of. Counsel was obviously aware of appellant's brother and chose to call him as a witness. Testimony was adduced at the evidentiary hearing that trial counsel was never informed, presumably even after interviewing appellant's brother of this injury (PCR.Tr. 238). Trial counsel testified that

had appellant given him any reason to believe something was going on in his life prior to the murders, he would have introduced that as evidence (PCR.Tr.238). Moreover, there was also conflicting testimony introduced that appellant's brother was not injured to the extent that he was not able to work (Stacey Depo.136).

Thus, appellant was not prejudiced as his proposed witnesses would not have helped his defense. Moreover, much of the evidence that appellant argues he needed in mitigation was primarily already before the jury at trial.

In light of the foregoing, appellant's sixth point on appeal must be denied.

VII.

The motion court was not clearly erroneous in denying, after an evidentiary hearing, appellant's Rule 29.15 motion alleging that he received ineffective assistance of counsel based upon counsel's alleged failure to investigate and present mitigation evidence that appellant was suffering from "extreme emotional disturbance" at the time of the murders, because trial counsel acted reasonably in that appellant was interviewed by two different mental heath experts as part of trial counsel's preparation for appellant's trial, and trial counsel cannot be deemed ineffective for failing to shop for a favorable witness. Likewise, appellant was not prejudiced in that appellant consented to trial counsel's strategy of not putting on mental heath experts as mitigation witnesses.

In his seventh point on appeal, the appellant contends that he received ineffective assistance of counsel based upon counsel's alleged failure to properly investigate a mitigation defense of "extreme emotional disturbance (App.Br.101). Specifically, appellant argues that trial counsel's investigation of appellant's mental condition, which involved consulting two mental health experts, and questioned them about whether they could provide "useful testimony in the second phase" was an inadequate investigation into mitigation evidence (App.Br.101).

During the evidentiary hearing, penalty phase trial counsel testified that:

> ... One of the first things I did was meet with the family, [appellant's mother, and appellant] talked about witnesses that could develop his life,

talked about witnesses that we thought could be useful in the second phase.

There was already a psychiatric evaluation that had been done in the file. [Dr.] John Rabun had performed that. I know, I re-contacted [Dr. Rabun] to see whether it would be useful, whether he could provide useful testimony in the second phase.

Somewhere along the line, we had [Dr.] Dan Cuneo do a second evaluation. And I had conversations with Mr. Cuneo about whether or not, in my opinion, in my belief, that their testimony would be beneficial for the second stage.

(PCR.Tr.201-202).

Q. [by the State]: ... I'm going to talk about Dr. Stacy.

A. Okay.

Q. And talking about the mitigator of extreme emotional distress.

A. Correct.

....

Q. Did you ever consider that mitigator?

A. I considered them all. You go down the line and you see- - you look to see what, if anything, could apply in your case.

Q. When you considered that mitigator, obviously you chose not to use that; is that correct?

A. Correct.

Q. Why?

A. We didn't have the evidence to support it.

Q. And what evidence were you looking to support?

A. Some evidence either by way of [appellant] or by expert testimony that there was emotional issues going on with [appellant] that would support- - would have supported the offense- - that supported that mitigating instructions as an explanation for the offense.

Q. And so you are looking from evidence from him?

A. I would be looking for evidence from him, both evidence from him either that he supplied the experts or evidence from him independently.

Q. And were you able- - and just talking about from him now, during his testimony, you are able to base a mitigator on evidence that comes forth during the first phase of the trial?

A. Correct. The jury specifically is instructed to consider all aspects of the trial, all the evidence both in the first and second phase.

Q. And did you feel that he gave you sufficient information during that in order for you to submit that mitigator?

A. No. That was part of the problem with the direct examination in the first phase. [Appellant] wouldn't even provide that he was angry.

Q. Then you also considered whether or not- - there was evidence from a psychiatrist or psychologist?

A. I had- - we had two- - we had a psychiatrist, a forensic psychiatrist evaluate [appellant] as well as a psychologist. I also considered introducing those- - I spoke with those individuals, and they weren't going to render any assistance based on the things that [appellant] had said.

I considered either having them re-interview or considered getting a third expert. I considered the risks involved with that, including some of the evidence that may have been adduced through cross-examination of the experts if ... I called those experts in the second phase.

Q. Now, we talked about Dr. Rabun. In particular, you said that you talked to him regarding this?

A. Yes. I talked to him on several occasions. ...

Q. And had you reviewed his report as well?

A. Yes.

Q. And was there any indication in the report that John Rabun had considered the [appellant]'s mental state at the time of the crime beyond just whether he was able to ascertain the wrongfullness of the act?

A. There is a specific portion of the report that I recall that he talked about any emotional distress that was going on at the time and whether that would have had - -

Q. I think you said that there was a specific line in the report, is that correct, regarding his mental state at the time?

A. As I recall.

Q. And what did that indicate to you?

A. I know [Dr. Rabun], from past experience, has- - not only will [he] do an NGRI type of evaluation or a 552, he's going to look at a case for diminished capacity issues. I think he did in this case, and I know I discussed it with him.

....

Q. I'm going to hand you a copy of State's Exhibit A and aks you if you recognize State's Exhibit A?

A. Yes.

Q. And what is State's Exhibit A?

A. It is the report of Dr. John Rabun, forwarded to this court, on August 1st, 1997.

...

Q. ... Did you receive a copy of [the exhibit] yourself?

A. Yes.

Q. And did you review your copy of [the exhibit]?

A. Yes.

(PCR.Tr.214-19).

Q. Now, I will refer you to page 12 of [the exhibit]. And under mental state at the time of the charged offense, are you referring to whether Dr. Rabun had indicated that in his report whether there was evidence to support a mitigator

of extreme emotional distress?

A. Uh-huh.

Q. And in there on the second line of the second paragraph under that section, what does that say?

...

A. "In like fashion, a mental disturbance did not substantially affect [appellant]'s behavior during the instant offense."

Q. And what did you take that to mean?

A. Dr. Rabun was making an opinion about [appellant]'s mental state at the time of the charged offense. He had ruled out whether or not his actions were a product of mental disease or defect, and he went further and ruled out whether or not there was any other mental disturbance that was going on with the person he was evaluating that could have caused or contributed to the charged offense.

Q. So going back to whether- - first of all, whether or not you had considered using an expert during the second phase, had you considered that, regarding the mitigator of extreme emotional distress?

A. When I first started preparing for the second phase, that was one of the first things I considered. I considered the usefulness and whether there would be evidence to support it. I considered the effect of this type of testimony on a jury.

And I considered that if we present this type of evidence - - you can also, through the expert, allow the jury to hear negative evidence that they would not have had an opportunity to hear other than through the cross-examination of the expert, and I considered all of those things.

Q. Now, going back to evidence that they might not ordinarily hear, what are you referring to?

A. Well, there's a lot of statements, there's conclusions in these reports by the examiners as to what caused this offense to occur. There's statements that [appellant] made. There's the risk that inconsistent statements could have come in, for instance, that [appellant] had told one examiner that it happened because the police had it out for him- - or he was charged, he didn't do it, but the police had it out for him.

You can object to that coming in, but there is also the risk that would be overruled. And, in fact, the evidence would come in like that. So contained in these reports is evidence that you may not want the jury to hear, and you cannot limit that and just offer a limited glimpse for your own purposes.

...

Q. Well, what are you referring to?

A. Cross-examination of the experts through the prosecuting attorney ... as well as obviously the opportunity for rebuttal, psychiatric type of evidence.

Q. And would that include Dr. Rabun as well that the State could call then as rebuttal.

A. I would have anticipated that Dr. Rabun would have been called as rebuttal.

Q. So, now we are talking about considering that mitigator. We talked about considering an expert regarding the mitigator, extreme mental or emotional distress. I want to go on to submitting the instruction about that- -

A. (Indicating) Yes.

Q. –Which we talked about briefly. But you did not submit an instruction on that; is that correct?

A. On extreme emotional distress?

Q. Yes.

A. I did not.

Q. And why was that?

A. I didn't think I had the evidence to support it, based on [appellant]'s direct examination and based on the evidence that- - I mean, direct and cross-examination of the guilt phase, as well as the evidence that had been adduced during the penalty phase.

(PCR.Tr. 224-28).

The motion court, in its findings of fact and conclusions of law denying appellant's motion, found that:

[Appellant]'s claim is refuted by both the court file and [appellant]'s own testimony. The court file contains the reports from a court-ordered psychiatric examination performed by Dr. John Rabun and the defense-requested psychiatric examination performed by Dr. Dan Cuneo. Both doctors opined that [appellant] did not and does not suffer from any mental illness. Furthermore, both doctors' reports indicate that [appellant] told each of them that he had not committed the murders. A lengthy hearing was conducted regarding Mr. Rosenblum's trial strategy as whether to use a psychiatric testimony during mitigation. Mr. Rosenblum talked Dr. John Rabun [PCR.Tr.217]. In determining whether to use Dr. Rabun as an expert during the penalty phase one of the things that Mr. Rosenblum relied on was Dr. Rabun's finding, "In like fashion, a mental disturbance did not substantially affect [appellant]'s behavior during the instant offense" [PCR.Tr.225]. Therefore, Mr. Rosenblum determined that he would not use Dr. Rabun or another witness because he did not believe he had sufficient evidence to support the instruction nor did he feel that it would be prudent because of the cross-examination that would occur [PCR.Tr.225-226]. "[T]rial counsel cannot be held ineffective for failing to shop for a more favorable expert witness." State v. Copeland, 928 S.W.2d 828,845 (Mo.banc 1996). Any testimony placing [appellant]'s mental state at issue would have allowed the State to present Dr. Rabun or Dr. Cuneo in rebuttal. In addition,

> [appellant]'s claim that a psychiatrist would have testified that he suffered from extreme mental or emotional disturbance is refuted by movant's own testimony during trial and during his deposition. During trial, [appellant] admitted the offenses but he testified that he "wasn't happy" but declined to adopt his attorney's proffered emotional states of "upset, confused or angry." [Tr.893-94]. [Appellant] repeatedly denied that he was angry or upset during the moments leading up to and including the killings [Tr.908-10,913,917,921-21]. During the deposition, [appellant] claimed that he did not commit the murders and would have testified to that during the penalty phase of trial [Winfield Depo.103,136]. He also stated that he did not want his attorneys to put on evidence that he was suffering from an extreme mental state or emotional state when he committed the crimes [Winfield Depo.132-33]. [Appellant]'s claim is refuted by the record and the testimony presented for and at the PCR hearing. The Court finds this claim is without merit and is denied.

(PCR.L.F.277-78).

A. Standard of review

On appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." *Supreme Court Rule* 29.15(k).

B. Trial counsel did not act unreasonably

Trial counsel did not act unreasonably in not pursuing mitigation evidence that

appellant acted pursuant to "extreme emotional disturbance." Appellant had undergone two interviews with mental health experts while the defense attorneys were preparing for trial (PCR.Tr.216). Based upon the interviews they had with appellant, neither of these doctors were able to find that appellant was operating under "extreme emotional distress" (PCR.Tr.216-17). Counsel was not ineffective because counsel is not obligated to shop for yet another expert witness who might provided favorable testimony. *State v. Kenley*, 952 S.W.2d 250,268-69 (Mo.banc 1997); *cert. denied* 522 U.S. 1095 (1998); *State v. Taylor*, 929 S.W.2d 209,225 (Mo.banc 1996) *cert. denied* 519 U.S. 1152 (1997). While counsel may have decided to consult yet a third expert, counsel was not ineffective for failing to do so.

Appellant asserts in his brief on appeal that he is not claiming trial counsel should have shopped for a more favorable expert (App.Br.106). In essence, however, that is exactly what appellant is arguing. His claim that trial counsel was ineffective for conducting "no investigation" (App.Br.101) into possible expert mitigation evidence, is refuted by the fact that trial counsel had appellant examined by two different mental health experts prior to trial, and neither were able to support the defense theory that appellant just "snapped." Thus, appellant's claim that "no" mitigation investigation was conducted is contrary to the record.

Appellant argues that the evaluations conducted by the two experts who saw appellant before trial were "not a substitute for an evaluation for mitigating evidence" (App.Br.106). Appellant, however, did not call either of the two mental health experts who

examined him prior to trial to testify at the evidentiary hearing, and therefore, has made no attempt to establish that they were incompetent in their determinations that they could provide no useful mitigation testimony. As appellant failed to present any such evidence, he cannot overcome the presumption of reasonable trial strategy. *See* State v. Tokar, 918 S.W.2d at 766.

Similarly, trial counsel had no reason to doubt the findings of the two mental health experts that were consulted as one saw appellant "very shortly after the offense" and the other just a few months later (Stacy Depo.121-22). Presumably, the events surrounding murders would have been much fresher in appellant's mind during these consultations, where appellant gave every indication that he was a "paragon of mental health" (Stacy Depo.121), rather than at the consultation taken after appellant was sentenced to the death penalty (Stacy Depo.122).

As is apparent, counsel took reasonable steps to investigate and obtain favorable expert testimony about appellant's mental status. For that very reason, appellant's reliance upon *Antwine v. Delo*, 54 F.3d 1357 (8thCir. 1995) is misplaced. In *Antwine*, the defendant underwent one psychiatric evaluation lasting approximately twenty minutes. *Id*. at 1365. From this short interview and a preview of police background sheets, the examiner concluded that Antwine "did not suffer from any mental disease or defect, and that his actions at the time of the offense were consistent with PCP intoxication." *Id*. Even though trial counsel knew that Antwine denied using PCP and that there were indications from the police reports that he had been acting "strangely" prior to the offense, trial counsel did not

request that a second evaluation be performed. *Id*. During Antwine's postconviction proceedings, another psychiatric evaluation was conducted, from which the doctor performing the examination concluded that Antwine suffered from a bipolar disorder. *Id*. Conversely, in the case at bar, counsel actively sought out a second medical opinion of appellant's mental status and, only after receiving the second opinion on appellant's mental status, did trial counsel drop the pursuit for evidence supporting the mitigator that appellant was operating under "extreme emotional disturbance" when he committed his murders. Such efforts stand in sharp contrast to the non-existent or perfunctory efforts that were made in *Antwine*.

Trial counsel did not act unreasonably in not shopping for another mental health expert, and thus, appellant did not received ineffective assistance of counsel.

C. Appellant was not prejudiced

Likewise, appellant was not prejudiced by his trial counsel's reasonable decision not to call a mental health expert to testify as mitigation evidence. To show prejudice, appellant must establish that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. *State v. Shurn*, 866 S.W.2d 447,455 (Mo banc 1993), *cert. denied* 513 U.S. 837 (1994). Under *Strickland*, a reasonable probability is that sufficient to undermine the confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694. Moreover, "[t]o prove ineffectiveness with regard to death penalty sentencing, [appellant] must show, that but for his counsel's ineffective performance, there is a reasonable probability that the jury would have

concluded after balancing the aggravating and mitigating circumstances, death was not warranted." *Rousan v. State*, 48 S.W.3d at 582.

As support for his argument that he was prejudiced, appellant alleges that "[h]ad counsel conducted a proper investigation and presented the jury with the compelling mitigator that [appellant] suffered from an extreme emotion disturbance at the time of the murders, the balance between the aggravating and mitigating circumstances would have been drastically altered" (App.Br.112). Here, however, based on appellant's testimony during guilt phase that he was not angry or upset at the moments proceeding the murders, any evidence introduced during penalty phase would have been viewed as a fabrication in a last-ditch measure to ensure a favorable sentence (PCR.Tr.216,228).

Likewise, appellant cannot now claim he was prejudiced as he informed the trial court that it was his desire to withdraw the mental disease or defect defense (Tr.555-57):

> Q. [by guilt phase trial counsel] ... You're aware of the fact that we filed a notice of intent to rely on mental disease or defect pursuant to Chapter 552, is that correct?
>
> A. [by appellant]: That's correct.
>
> Q. All right. And we indicated to you that we wanted to do that in order to explore the possibility that that might have been available to us as some sort of a *mitigating factor in both the first stage and if we ever got to the second stage*, is that correct?
>
> A. That's correct.

Q. And you were, in fact, examined, by Mr. Rabun and subsequently examined by Dr. Dan Cuneo, is that correct?

A. That's correct.

Q. And you're aware that there is nothing in either of those reports which would allow us to proceed either under the defense of mental disease or defect, or under the potential defense or diminished capacity, is that correct?

A. That's correct.

Q. At this time both [Rosenblum] and I have advised you that we think we need to withdraw that as a possible defense because there really is nothing to that defense, is that correct.

A. That's correct.

Q. And it is your desire that we withdraw that at this point?

A. Yes.

Q. And you understand the consequences of that is that ongoing through the proceeding we will not be proceeding under the theory that you acted in a diminished capacity?

A. That's correct.

Q. And we talked about this, and you understand the consequences of withdrawing it, and essentially *there's not going to be any expert testimony to talk about your state of mind or anything else*, is that correct?

A. That's correct.

Q. And there was a time at which I believe both Dr. Rabun and Dr. Cuneo advised you of the limited confidentiality of any discussions that you had with them, correct?

A. That's correct.

Q. And there is also a potential, if we didn't strike the defense, they could be called as witnesses to contradict other statements that you made either to the police, to other family members, and, more importantly, if you decide to testify they could also be called to contradict your testimony in court. Do you understand that?

A. Yes, I do.

(Tr.555-57) (emphasis added).

As this excerpt indicates, appellant was fully aware, and even *consented*, to his trial counsel's strategic decision to not rely upon any expert evidence of this sort. Moreover, appellant acknowledged that he would be giving up the right to present an expert as mitigation evidence in the penalty phase. Appellant cannot not claim prejudice from actions that he consented to.

In light of the foregoing, appellant's seventh point on appeal must be denied.

VIII.

The motion court was not clearly erroneous in denying, without an evidentiary hearing, appellant's Rule 29.15 motion alleging that he received ineffective assistance of counsel based on counsel's "failure" to request MAI-CR3d 310.06, which would have instructed the jury whether appellant's statements to the police were voluntary, because appellant did not plead that this was not a matter of trial strategy and appellant's claim of prejudice is refuted by the record in that his defense at trial was not that he was innocent of the charges; rather his defense was that while he was guilty of murder in the second degree, he did not have the requisite mental state for murder in the first degree and thus, appellant's statements to the police, in which he said that he "snapped," were essential to his defense.

In his eighth point on appeal, the appellant contends that he received ineffective assistance of counsel based upon trial counsel's "failure" to request that the jury be instructed, pursuant to MAI-CR3d 310.06, on the weight in which to give appellant's confessions to the police (App. Br.113).

A. Facts

As this Court found in the direct appeal in this matter, appellant confessed to the shootings when he was questioned by the police:

> ...the arresting officer Mirandized [appellant] who then indicated that he understood his rights. The officer then asked him what he had done with the gun. [Appellant] replied that he has thrown it in a creek. After being

processed at the police department, another officer again Mirandized [appellant]. Again, [appellant] acknowledged his understanding of his rights. Furthermore, the officer had [appellant] initial each point on the Miranda form as they proceeded through it, had him sign it, witnessed it with another officer, and [appellant] circled "yes" under the question "do you wish at this time to talk or give a statement." ... Clearly, the record reflects the constitutional validity of [appellant]'s waiver. ... [N]othing in the record suggests a coerced or uninformed waiver of that the trial judge did not believe that waiver was knowing, intelligent and voluntary.

State v. Winfield, 5 S.W.3d 505,512 (Mo.banc. 1999).

In his amended Rule 29.15 motion, appellant alleges that he received ineffective assistance of counsel based upon counsel's failure to request that the jury be read MAI-CR 310.06. This instructions provides that:

> Evidence has been introduced that the defendant made certain statements relating to the offense for which he is on trial.
>
> If you find that a statement was made by the defendant (, and that at that time he understood what he was saying and doing), and that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you may give it such weight as you believe it deserves in arriving at your verdict.
>
> However, if you do not find and believe that the defendant made the statement (, or if you do not find and believe that he understood what he was saying and doing), or if you do not

find and believe that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you must disregard it and give it no weight in your deliberations.

(MAI-CR3d 310.06).

The appellant's pleadings argue that:

> MAI-CR3d 310.06 instructs juries to disregard statements if the jury finds and believes that the statement was not freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement and the jury must give it no weight in deliberations.
>
> [Appellant] was prejudiced by trial counsel's error in failing to request MAI-CR 310.06 because the jury was not instructed by the Court that the jurors were the ones who could decide how much weight, if any, to place on the statements. The jury would have made the reasonably inference from the evidence that since [appellant] was in a rage during that night, his statements were entitled to little or no weight. A reasonably competent trial attorney under similar circumstances would have requested the Court to instruct the jury accordingly. But for trial counsel's failure to request the court to instruct the jury pursuant to MAI-CR3d 310.06, there is a reasonable probability that the outcome of the proceeding would have been different.

(PCR.L.F.124-25) (emphasis in original; footnote omitted).

In denying appellant's claim without an evidentiary hearing, the motion court found that:

> ... [Appellant] claims that trial counsel was ineffective for failing to instruct the jury pursuant to MAI-Cr3d 310.06 (Confession or Admission of Defendant). The court found that [appellant]'s admissions to the police were admissible. The Missouri Supreme Court held that

"[c]learly, the record reflects [the] constitutional validity of [appellant]'s waiver." Winfield, 5 S.W.3d 505 at 512. [Appellant] can show no prejudice from trial counsel's failure to request MAI-CR3d 310.06 because he can show no evidence that [his] statements to the police were coerced or uninformed. "The instruction would serve only to direct attention to an obviously voluntary confession." Clemmons v. State, 785 S.W.2d 524, 549 (Mo. banc 1990). This claim is denied as being meritless.

(PCR.L.F.288).

B. Standard of review

On appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." *Supreme Court Rule* 29.15(k).

The standard for denial of a motion for postconviction relief without an evidentiary hearing is set out in *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997), *cert. denied* 524 U.S. 957 (1998):

No evidentiary hearing will be required unless the motion meets three requirements: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters of which [appellant] complains must have resulted in prejudice.

Id. at 497.

C. Appellant did not allege that trial counsel acted unreasonably

In order to show ineffective assistance of counsel, appellant must show that his

counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," and that he was prejudiced by his counsel's failure to competently perform. *Wilson v. State*, 813 S.W.2d at 835.

Here, there is no indication in the record that trial counsel acted unreasonably in not requesting that the jurors be instructed pursuant to MAI-CR3d 310.06 regarding the weight to give appellant's statements to the police. Moreover, nowhere in his amended Rule 29.15 motion does appellant allege that this was not done pursuant to reasonable trial strategy (PCR.L.F.122-25).

An evidentiary hearing is not a means by which to provide the movant with an opportunity to produce facts not alleged in the motion. *State v. Brooks*, 960 S.W.2d at 497. A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. *White v. State*, 939 S.W.2d 887,893 (Mo.banc 1997), *cert. denied*, 522 U.S. 948 (1997). While courts are solicitous of postconviction claims that represent a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. *Id*. Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. *Id*. Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings. *Id*.

In the case at bar, appellant's pleadings fail to allege or argue that this "failure" on

the part of trial counsel to request that MAI-CR3d 310.06 be read to the jury was not a matter of reasonable sound strategy. There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. *White v. State*, 939 S.W.2d at 895. The specific facts alleged in a postconviction motion must be sufficient to overcome this strong presumption. *State v. Jones*, 979 S.W.2d 171,180 (Mo.banc 1998), *cert. denied* 525 U.S. 1112 (1999). Appellant cannot convincingly argue to this Court that completely omitting any allegations that trial counsel acted unreasonably by not requesting the jury instruction would overcome the presumption of reasonably trial strategy.

Nor does appellant address the error the insufficiency of the pleading in terms of the failure to allege unreasonably trial strategy. Rather, appellant chooses to dodge this issue by arguing that the motion court could not make findings about whether trial counsel's actions constituted reasonable trial strategy:

> In *Clemmons*, this Court found that the failure to request an instruction based on MAI-CR3d 310.06 "was sound trial strategy in this case.". ... This quote immediately preceded the sentence quoted by the motion court. The motion court cannot attribute [trial counsel's] failure to request this instruction to a strategy, reasonable or otherwise, without [trial counsel] claiming such strategy at a hearing. ... It bears noting that it is unlikely that [trial counsel] had a strategy for not offering this instruction; after all, his practice is to announce his strategies on the record. ... He made

no such record about MAI-CR3d 310.06.

(App.Br.118). Respondent certainly agrees that "the motion court cannot attribute [trial counsel's] failure to request this instruction to a strategy, reasonable or otherwise".... The inability of the motion court to make such a finding, however, is entirely due to appellant's failure to allege that trial counsel did not act pursuant to a reasonable trial strategy.

Likewise, this deficient pleading cannot be remedied by an evidentiary hearing. It is well settled that an evidentiary hearing is not a means by which to provide the appellant with an opportunity to produce facts not alleged in the motion. *State v. Brooks*, 960 S.W.2d at 497; *see also State v. Harris*, 870 S.W.2d 798,815 (Mo.banc 1994), *cert. denied* 513 U.S. 953 (1994) (finding that Missouri is a fact pleading state and deficiencies in pleadings cannot be remedied by evidentiary hearings or by briefs on appeal). Appellant provided the motion court with no indication that trial counsel was unreasonable. The motion court was not clearly erroneous in denying appellant's claim without an evidentiary hearing.

D. Appellant was not prejudiced

As the motion court properly found, appellant was not prejudiced by trial counsel's failure to request that the jurors be instructed pursuant to MAI-CR3d 310.06. To be prejudiced, there must be a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. *State v. Shurn*, 866 S.W.2d 447,455 (Mo banc 1993), *cert. denied* 513 U.S. 837 (1994). Under *Strickland*, a reasonable probability is that sufficient to undermine the confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694.

In the case at bar, appellant's claim of prejudice is refuted by the record in that his defense at trial was not that he did not commit shootings, but rather that he did not have the requisite mental state for first degree murder. In fact, appellant concedes this in his brief (App.Br.113). The amended Rule 29.15 motion asserts that trial counsel was ineffective for not requesting that the jury be instructed to "disregard" appellant's statements to the police (PCR.L.F.125). The statements appellant gave to the police, as trial counsel argued in his closing, tended to support the defense theory that appellant "snapped," and thus did not have the requisite mental state for first degree murder (Tr. 1000-1001). Moreover, the only evidence that the statements provided that were beneficial to the State were facts not in dispute: that appellant was the shooter (Tr.942-43,947-48). Appellant can hardly claim prejudice from trial counsel relying on evidence that tended to support appellant's theory that he did not deliberate in the murders.

Additionally, by requesting that the jury be instructed whether appellant's statements to the police were voluntary, and thus could even be considered, trial counsel would have only emphasized to the jurors that appellant did not want this evidence in front of them. As appellant admits, his trial counsel sought to excluded these statements altogether from the trial and include them in appellant's motion for new trial so that this issue would be preserved for review during appellant's direct appeal (App.Br.113-14). This indicates that trial counsel actively endeavored to keep this evidence from appellant's trial–either by excluding it altogether or obtaining a new trial on appeal. Obviously, however, the jurors were not aware of the battle that trial counsel fought, outside of their presence, to keep this

evidence out. And, by not requesting that the jury be instructed to "disregard" appellant's statements, trial counsel was able to effectively argue that:

> You have to remember we put him on the stand knowing that because you have the right to hear everything. .. [Y]ou do have the right to hear everything, good, bad, ugly, horrible. And that's what we did, we gave you everything. We didn't hide anything from you, we didn't conceal anything from you, he didn't get up here and deny that he shot anybody. And to tell you something, the State has known from day one, from day one when he talked to the officers, because it's in the reports that they have used for their entire case, that he told them he snapped.
>
> ...
>
> All right. I read it out of the police report to you, because he says: I don't remember if I said it to him, I don't remember in what order. Doesn't mean- - I mean do you think the police officer went back and then just started filling stuff out that's going to help their case later. That was his admission, if they needed another one, since he's already told them that he got rid of the gun, that was the admission; that he had shot not one person, not two people, but that he had shot - and what he said to the police was: Once my finger was on the trigger I couldn't stop. All right. You never would have heard any of that stuff if we hadn't put him on. You never would have heard [the prosecutor] cross-examining him and yelling at him and trying to make it

> look as though just today for the first time he said he snapped, because he had told the police that since September 10th of 1996, and that's why we put him on. Because you have the right to know what he said from the very beginning.

(Tr.1000-1001). Had appellant requested that the jurors be instructed that they could disregard appellant's statements to the police, this would have severely undermined appellant's argument that nothing was kept from the jury. It would have also damaged appellant's assertions that appellant was claiming he did not deliberate in the murders from the beginning. In light of trial counsel's closing argument, appellant was not prejudiced by his trial counsel's actions.

As appellant did not receive ineffective assistance of counsel, appellant's eighth point on appeal must be denied.

CONCLUSION

In view of the foregoing, the respondent submits that the denial of Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 25,239 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and accurate copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 7th day of August, 2002, to:

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Appendix